No. 89-5961

In The

Supreme Court of the United States

October Term, 1990

ROBERT LACY PARKER,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

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In the Circuit Court in and for Duval County, Florida
Florida v. Robert L. Parker

Case No. 82-1658CF

[2001] * * * And then we have – in the prior case we had the element of kidnap on Padgett, I did not give – I gave the element of kidnap on Padgett, that is, two, the death occurred as a consequence of and while defendant was engaged in the commission of the crime of kidnapping. The other part, the death occurs as a consequence of and while attempting to commit; one, death occurred as a consequence of and while the defendant or an accomplice was escaping from the immediate scene. I don't think those two are applicable. But I will be happy to hear you on them.

MR. AUSTIN: Which is not applicable? Kidnapping is applicable.

THE COURT: We are not talking about that. Death occurred as a consequence of and while defendant was attempting to commit, attempting to commit.

MR. GREENE: Yeah.

THE COURT: And the one below that, death occurs as a consequence of and while the defendant or an accomplice was escaping from the immediate scene of –

MR. AUSTIN: Oh.

THE COURT: I will hear you gentlemen on this.

MR. GREENE: I agree the second and third. As far as one, I think it ought to be given, I think it ought to be kidnapping.

[2002] THE COURT: Robbery?

MR. GREENE: As to Padgett and robbery as to Nancy Sheppard.

THE COURT: I will hear you on it, Mr. Link.

MR. GREENE: And I would argue, even though I didn't argue last time because I really didn't think about it, but the testimony was clear this time that he took the woman's clothes, Jody Dalton's, and burned them. And I think the jury could find that, you know, they did take her clothes with force and violence.

THE COURT: Well, all right. On the other part there on the kidnapping and robbery, I will hear you, Mr. Link, on number two.

MR. LINK: All right. I would agree that the second two paragraphs under number two should not be given. We object to any instruction on felony murder. We were not given a bill of particulars as to whether the State was relying upon a premeditated or felony murder theory and we feel that since the indictment alleged premeditated murder they should be forced to prove premeditated murder. No felony is alleged in the indictment or in a statement of particulars as to what felony they are relying upon.

We also feel that there is no evidence that there was a kidnapping or that there was a robbery in any of [2003] these murders.

THE COURT: Mr. Greene?

MR. GREENE: Well, obviously the law clearly is and it's even in the beginning of the standard jury instructions or recognizes that we don't need to charge it in the indictment, we don't need to choose. And –

THE COURT: All right.

MR. GREENE: And I think it ought to be given clearly, though no one said we were robbing Padgett or kidnapping Padgett, I mean, the evidence is clear the jury could circumstantially – the jury could infer that's exactly what was going on.

THE COURT: Well, insofar as submitting both felony murder and premeditated murder, the law is clear on that and that doesn't bother me. But you take exception to the kidnapping and robbery?

MR. LINK: Yes, sir.

THE COURT: All right. I intend to give it on both of them.

Number three, that the defendant was the person who actually killed padgett and/or Sheppard or Dalton. Wait a minute. We have got Sheppard and – Sheppard and Padgett, but we don't have it on Dalton. I will hear you on 3(a) and (b).

* * *

[2062] MR. LINK: We feel that's a correct statement of the law as to aiding and abetting a first degree murder, premeditated first degree murder. And we feel jury instructions as it stands are not adequate.

THE COURT: You cite 18 Fla. 9-9 (1882).

MR. LINK: It's been law for a long time, Judge.

THE COURT: 1933.

MR. LINK: As it is, it has been an awful long time, but that's what qualified it in the jury instructions that exist now. So I justify –

THE COURT: I will not give that anyhow, deny that. Number two.

"First degree murder is divided into two categories: premeditated murder and felony murder.

"In order to find the defendant guilty of first degree murder, it shall be necessary for you to specify in your verdict whether the defendant is guilty of first degree murder by premeditated murder or whether he is guilty of first degree murder by felony murder. Your verdict in this regard must be unanimous. Of course, if you are not convinced beyond every reasonable [2063] doubt that the defendant is guilty of first degree murder, then you must find him not guilty as to that charge."

Now, he's cited this Fifth Federal DCA.

MR. LINK: Yes, sir. That relates to Gibson, it was not a murder case, it was a dealing in stolen property case, but the case, basically, holds that a defendant is entitled to a unanimous verdict when there are different ways of committing a crime stated within a single statute. And the specific way must be alleged in the indictment and must be proved by the State. And the defendant is entitled to a unanimous verdict as to which way the crime was committed.

THE COURT: Anyhow, that's not the law in the State of Florida and it's not required under the standard jury instructions. I think it would be error to do it that way. I deny it.

Defendant's requested standard jury instruction number three.

"A defendant's version of a homicide cannot be ignored where there is an absence of other evidence sufficient to contradict his explanation."

* * *

[2109] THE COURT: No, I did that in the Groover case and the reason I think it was confusing, I thought about it, I changed it.

MR. LINK: It is confusing, I was just thinking about it. I don't know which is better.

THE COURT: I don't know which is better, but I think this way is better. I spent some time thinking about it last night. And if you say and – and/or any of them, then they can't -- they have got to find them dead before they can come back with a verdict. So I just think leave it the way it is.

If you find that Richard Padgett, Nancy Sheppard and Jody Dawn Dalton were killed by the defendant, you will then consider the circumstances. I had it the other way and/or, and/or, and/or either of them or either of them, but I think it's confusing and I decided to do it this way because – if they don't find them dead, then they can't come up with a verdict.

On the next page, in murder in the first degree, number one, that Richard Padgett, Nancy Sheppard, Jody Dawn Dalton are dead. Two, that the death was caused by the criminal act or agency of the defendant. Three, that

there was a premeditated killing of Richard Padgett, Nancy Sheppard and Jody Dawn Dalton.

And then on felony murder it's this way, if you [2110] will follow me. Number one, that Richard Padgett and Nancy Sheppard are in fact dead. Two, that the death occurred as a consequence of and while the defendant was engaged in the commission of the crime of kidnapping of Richard Padgett and the crime of robbery of Nancy Sheppard. Three (a), that Richard Padgett was killed by a person other than the defendant who was also involved in the commission of – commission or attempt to commit kidnapping of Richard Padgett, but that the defendant was present and did knowingly aid, abet, counsel, or hire, or otherwise procure the commission of the kidnapping.

(b), that Nancy Sheppard was killed by a person other than the defendant who was also involved in the commission or attempt to commit robbery of Nancy Sheppard, but the defendant was present and did knowingly aid, abet, counsel, or otherwise hire or otherwise procure the commission of the robbery.

Agree? Does that state the law? That's what we went over last night.

MR. LINK: Yes, sir, I believe I objected to the kidnapping and –

THE COURT: I know, but do you agree?

MR. LINK: – and the robbery instructions.

THE COURT: But you agree if I am going to give it, [2111] that's the way it ought to be given?

MR. LINK: Yes, sir.

THE COURT: All right. And then for the purpose – next is kidnapping. For the purpose of this case, the crime of kidnapping is defined as: kidnapping means forcibly, secretly, or by threat, confinement, abducting, or imprisoning another person against his will and without lawful authority with the intent to hold for ransom or reward or as a shield or as a hostage to commit or facilitate the commission of any felony or to inflict bodily harm upon or to terrorize the victim or another person.

And that's it. I am not going to give four because it talks about some governmental function and there's no evidence of that.

Now, I'd like, if I can do it with your permission, next to say the definition of robbery. For the purpose of this case, the crime of robbery is defined as the taking of money or property from the person or custody of another by force, violence, or assault or by putting the victim in fear. The property taken must be of some value and at the time of the taking the defendant must have intended to permanently deprive the victim of the money or property.

Is that agreeable, Mr. Link?

[2112] MR. LINK: Yes, sir.

THE COURT: Mr. Greene?

MR. GREENE: Yes, Your Honor.

THE COURT: All right. Second degree – follow me on that, get down to the numbers. Number one, that Richard Padgett, Nancy Sheppard – no, that applies to all of them. That the death was caused by the criminal act.

And three, that there was an unlawful killing of Padgett, Sheppard and Dalton, by an act imminently dangerous to another, evincing a depraved mind. It applies to all of them.

* * *

[2092] MR. GREENE: The State's got – these are the State's requested jury instructions. I have got seven of them.

THE COURT: Number one I am not going to give. I don't think it's proper. The standard jury instructions comment on it and I have already defined it.

And, incidentally, gentlemen, can I get you to agree on something before I forget it? Would you agree to this definition of robbery? Let me finish up these. In any event, I will deny State's requested jury instruction number one.

Number two.

"Proof of a homicide committed in the perpetration of a robbery or kidnapping may be shown under an indictment charging the unlawful killing –" I gave that in the Groover case, I think that's a proper instruction. I will hear you on it, Mr. Link.

MR. LINK: I would object to it being given. I think, Your Honor, if Your Honor is going to be instructing on felony murder anyway, it's pretty obvious that they can do that.

THE COURT: I know they can, but it says in here premeditated murder. And then it says in the indictment premeditated murder and then we start reading

felony murder instruction. And so I think this is explanatory [2093] of that transition from premeditated murder to felony murder. I think it's proper and I grant that.

MR. LINK: Consistent with our previous motions and objections, we do object to it because we feel the indictment should allege either premeditation or felony murder or both.

THE COURT: Okay. Number three.

"Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used –"

I will not give that.

Four.

"Coercion or duress is not available as a defense in a case of homicide or attempted homicide. Coercion or duress does not excuse or justify the murder or attempted murder of an innocent third party."

Now, I did give that in the Groover case and I believe I am going to take that under advisement. I believe that I took the instructions – is that the way I wrote it? I don't recall how I did it. Let me look just a second.

* * *

[2087] MR. GREENE: That's exactly the statement of the law. I mean, you tell them about contradictory statements to whether or not they previously made statements contrary to their present testimony. That's exactly like the last five or six requested jury instructions except it purports to define a deposition, and deposition is merely a prior statement. I think the jurors understand that.

THE COURT: As I say, I would have done it during the course of the trial, but I am not going to do it now.

MR. GREENE: Unless you want to add the State doesn't have the right to take the defendant's deposition.

THE COURT: "One of the defenses asserted in this case is that the defendant participated in the alleged offense under duress; that is, that he was forced to participate in the offense alleged. In order to constitute a defense, the coercion or duress must be present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done."

Now, that was – we had that – we had that in the Groover.

MR. LINK: Well, –

[2088] MR. GREENE: Well, I have got – this implies that coercion is a defense and, obviously, it clearly is not. And the State has got a requested instruction saying coercion to murder is not a defense and would –

THE COURT: One of the defenses – this is taken from the Koontz case. That's it.

"One of the defenses asserted in this case is that the defendant participated in the alleged offense under duress; that is, that he was forced to participate in the offense alleged. In order to constitute a defense, the coercion or duress must be present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm."

That was in the Ellwood case.

MR. LINK: Yes, sir.

MR. GREENE: This is an entire misstatement of the law because there is no law in the state, none of these are murder cases I am confident.

MR. LINK: That's correct.

MR. GREENE: That's right, because direct coercion is not a defense or duress is not a defense to the charge of murder.

THE COURT: In the Groover case we had –

MR. GREENE: I have got it here, Judge, but we just [2089] haven't got it here as far as the requested jury instruction. I have a requested jury instruction that says that coercion or duress is not available as a defense in the case of homicide or attempted homicide. Coercion or duress does not excuse or justify the murder or attempted murder of an innocent third party.

THE COURT: 382 So. 2d 796; is that Koontz?

MR. GREENE: No, it's Cawthon.

MR. LINK: I don't believe that's a correct statement of the law either as stated there.

MR. GREENE: It's the quote right out of the opinion.

MR. LINK: Well, it's limited to cases of premeditated murder and, I believe, the law is clear that it is –

MR. GREENE: No, it does not say that, I beg to differ with you. If you want to get the opinion.

THE COURT: Now, I am not going to give this one. I know that does not apply to the homicide case. I don't believe that is the law and I don't intend to give number thirty-five.

MR. LINK: Well, it's our contention as to duress that unless – that a duress instruction would be applicable and appropriate for a defendant who is not an actual perpetrator and it would be a defense to an [2090] aider and abettor in a homicide.

THE COURT: Those cases don't say that.

MR. LINK: I understand that. I feel that the law is somewhat in a state of flux there and differs from jurisdiction to jurisdiction. I think the Florida cases that infer it is not a defense for aider or abettor are incorrect.

THE COURT: Now, number thirty-six.

"For a conviction under felony murder, there must be direct causal connection between the homicide and the felony. Something more than mere coincidence of time and place between the two must be shown; otherwise, the felony murder rule would not be applicable. There is therefore no criminal liability for murder on the part of a co-felon when the homicide was a fresh and independent product," et cetera. I will not give that. That's covered in the standard jury instruction.

Number thirty-seven.

"Under the law of felony murder, there is no criminal liability where the homicide was a fresh and independent product –" I will not give that. That's covered by our standard jury instructions.

MR. LINK: We feel this is a statement of independent intervening act defense to felony murder and should be given.

* * *

[2092] MR. GREENE: The State's got – these are the State's requested jury instructions. I have got seven of them.

THE COURT: Number one I am not going to give. I don't think its proper. The standard jury instructions comment on it and I have already defined it.

And, incidentally, gentlemen, can I get you to agree to something before I forget it? Would you agree to this definition of robbery? Let me finish up these. In any event, I will deny State's requested jury instruction number one.

Number two.

"Proof of a homicide committed in the perpetration of a robbery or kidnapping may be shown under an indictment charging the unlawful killing –" I gave that in the Groover case, I think that's a proper instruction. I will hear you on it, Mr. Link.

MR. LINK: I would object to it being given. I think, Your Honor, if Your Honor is going to be instructing on felony murder anyway, it's pretty obvious that they can do that.

THE COURT: I know they can, but it says in here premeditated murder. And then it says in the indictment premeditated murder and then we start reading felony murder instruction. And so I think this is explanatory [2093] of that transition from premeditated murder to felony murder. I think it's proper and I grant that.

MR. LINK: Consistent with our previous motions and objections, we do object to it because we feel the indictment should allege either premeditation or felony murder or both.

THE COURT: Okay. Number three.

"Evidence from which premeditation may be inferred includes such matters as the nature of the weapon used –"

I will not give that.

Four.

"Coercion or duress is not available as a defense in a case of homicide or attempted homicide. Coercion or duress does not excuse or justify the murder or attempted murder of an innocent third party."

Now, I did give that in the Groover case and I believe I am going to take that under advisement. I believe that I took the instructions – is that the way I wrote it? I don't recall how I did it. Let me look just a second.

MR. GREENE: I believe it was given, I just quoted it from the opinion, Judge. I just got it right out of the opinion of Cawthon, a First DCA case that says, "The coercion defense is not available in a case of [2094] homicide or attempted homicide. The coercion defense has

received recognition in two Florida cases. Hall involved the use of the defense in a perjury trial. Koontz involved an attempted robbery. The defense has never been recognized in a Florida case involving homicide or attempted homicide. The general authority is that coercion does not excuse or justify the murder or attempted murder of an innocent third party. We align ourselves with that general authority, period."

THE COURT: Bring me that case.

MR. LINK: I think that case has a very brief discussion and it's not as detailed as the decision of Wright versus State.

THE COURT: Oh, yeah. That's the one. I had which one?

MR. LINK: Wright, 402 So.2d 493 which has a considerably more extensive discussion.

THE COURT: Have you got it highlighted someplace?

MR. LINK: Probably not.

THE COURT: Well, highlight what you are talking about, I intend to give an instruction on it. I will look at both of them. I did give this in the Groover case, I am going to grant as modified and I don't know what the modification would be.

MR. LINK: I would request a modification to the [2095] effect that it is a defense to felony murder where the killer is not a – is not the actual killer. He's simply been forced to participate in the underlying felony.

THE COURT: It doesn't say that.

MR. GREENE: Sure doesn't.

THE COURT: Neither one of those cases say that.

MR. LINK: Yes, sir.

THE COURT: It says it in there?

MR. LINK: Wright indicates that it is quite – there is a footnote on Wright. "Where duress is offered as a defense to first degree murder under felony murder charge, a different question is presented, since duress is a recognized defense to the underlying felony, and the rationale of the rule prohibiting the duress defense in the crime of homicide appears applicable."

THE COURT: Well, highlight what you want me to look at.

MR. GREENE: I think this, obviously, this Wright is a Third DCA case and we have got a First DCA case that is pretty darn clear on it and doesn't make any distinction. I don't see how you can make any distinctions, we are not talking about duress to robbery or kidnapping, we are talking about duress to the [2096] murder.

MR. LINK: There's an entire section discussing duress here.

THE COURT: Okay. All right. I will give it as modified and I will come up with something on that.

MR. LINK: Consistent with out request on the duress instruction we, of course, would object to any instruction stating duress is not a defense to –

THE COURT: If you don't argue, I won't give it, If you don't argue duress.

MR. GREENE: Waite a minute. The Defense already stated that on the witness stand. Whether he argues it or not, I think we have – we have got to have this instruction.

THE COURT: All right.

MR. GREENE: Whether Bob argues it or not, the defendant sure has.

THE COURT: Okay. Number five.

"It is the law of this state that every act and declaration of each member of a conspiracy is an act in declaration of the law and is therefore original evidence against each of them.

"There is no prerequisite that a conspiracy be judged before declarations or acts of co-conspirators are admissible under this rule of law."

* * *

[2102] MR. LINK: Well, even if that's so, it would only apply to the defendant's aggravated assault case and not to the murder charges because he was arrested for aggravated assault at that time. And that would be the only basis for admitting those statements as it relates to the aggravated assault charge.

THE COURT: Let me read it over. I will take it under advisement.

I will take – I have granted four as modified, we haven't decided how yet that is going to be modified.

MR. GREENE: I really would oppose any modification of four.

THE COURT: I haven't read it, I don't recall it that well. I have got the cite here, obviously I had it highlighted earlier.

MR. GREENE: The most is would be dicta in the Wright case and it's pretty clear the First DCA case was given sets out the law at these – in this district and the State of Florida.

THE COURT: I have granted four and two and I have taken six and seven under advisement.

* * *

[2117] Now, I have taken the duress instruction which I am going to read over, I have taken that under advisement. Who gave this on Loudd?

MR. LINK: Ralph did.

MR. GREENE: The case?

THE COURT: Yeah.

MR. GREENE: That's the case on – that deals with –

MR. LINK: Another person has pled guilty.

MR. GREENE: That's the case dealing with cautionary instruction.

THE COURT: Oh, yeah. Okay. All right. I have got it. I will do a cautionary instruction on that. I will read over the Loudd case to see whether or not this states all of the elements therein. I will grant that, but I am going to read it over and see whether or not it covers it.

Then we have the ones, the instruction on coercion and duress. I have taken that under advisement.

I have granted the one on number – the one which shows – it explains the transition. Which ones do I then have under advisement? The only one I have under advisement then is –

MR. GREENE: You have two, coercion and exculpatory statements.

MR. LINK: You have – well, you may modify the [2118] cautionary instruction somewhat. Coercion is under advisement.

THE COURT: Wait a minute. See which ones I have. I have one on coercion that is under advisement for modification. Then I have one on the transition between felony murder and murder in the first degree, kidnapping, et cetera. And then I have the one on the behavior of the defendant, the ex post facto things, that's under advisement. Now, what was the other one?

MR. LINK: As to exculpatory statements was under advisement.

THE COURT: Which number was that – here it is. I am sorry.

MR. GREENE: I gave you all those cases on them.

THE COURT: Yeah. All right.

(On Tuesday, March 8, 1983, court recessed at 5:00 o'clock p.m. to be reconvened on Wednesday, March 9, 1983, at 1:00 o'clock p.m.)

March 9, 1983

* * *

[2119] pursuant to adjournment of the preceding session, and the following further proceedings were had out of the hearing of the jury:)

THE COURT: Gentlemen, you got my charges there?

MR. GREENE: Yes, Your Honor.

THE COURT: Would you hand them to the Clerk?

I will hear exceptions and objections by the State and the Defense. I am not sure of the order in which these are in, I just threw them together. I think they are pretty much in the order I am going to give them, but we just finished them a short time ago.

MR. LINK: I would renew all previously stated objections and requests I made at charge conference. Particularly here I would renew my objection to the instruction that coercion is not a defense to homicide. I believe it's too general an instruction. Coercion is a defense to felony murder.

THE COURT: Well, if that's not what that case is, then I stand to be corrected. But I read it over, I read

all the cited cases in the Cawthon case, I read the Hall case and what was the other one?

MR. LINK: The Wright decision.

[2120] THE COURT: The one subsequent to the Cawthon case, the one you cited

MR. LINK: Yes, sir.

THE COURT: If you read that case over, that says clearly and unequivocally it is not. The only distinction they made was a possibility if a felony murder was charged under certain circumstances, but even then it was equivocal. And I read that thing until about – well, all the cases that were cited in both of them, by both the State and the Defense in your proposed instructions, I read them over until about – that and other cases until about 11:30 last night. I don't think there is any question or doubt that this instruction on coercion and duress is the law in the State of Florida. It certainly does not apply.

In addition to that, the cite you gave was a Third DCA, it did not say that there was any moderation or change of the law in the Cawthon case. In fact, they cited the Cawthon case. But they did say and they equivocated whether or not in view of the felony murder, whether it might be a defense. But even so, the factual situation in the cases they cited is different from the one that we have here. So I think this is the law, it's the law of the State of Florida, [2121] it's the Florida Supreme Court holding and I think that is the law and I am going to give it.

MR. LINK: I would object, also, on the ground we are not going to be arguing duress as a defense

anyway and I feel that sort of instruction is improper and misleading.

THE COURT: Well, you may not argue it, but if threats and intimidation and duress were not the defendant's testimony when he testified, the State has based their, I assume they didn't, they don't – they, obviously, submitted this instruction on the basis of his testimony, had he not testified in that manner, I'm sure the State would not have requested the charge. That is the way I heard his testimony.

What say you, Mr. Greene?

MR. GREENE: Yes, Your Honor, that was exactly the reason. In fact, the defendant did state during cross examination that he was coerced and that his defense was coercion. If my recollection is correct, he stated that on cross examination to a question that I asked him. And, certainly, his testimony is to that effect. He said everything he did was because he was afraid and because his family had been threatened and because he had been threatened. I mean, if – if that isn't his defense, then his testimony just doesn't make [2122] any sense at all.

It's inconceivable, I think, that is his defense, as he said during cross examination.

THE COURT: Mr. Link, do I understand that you are not going to say he was threatened or intimidated?

MR. LINK: No, sir.

THE COURT: You are not?

MR. LINK: No, sir.

THE COURT: Well, even so he did.

Now, let's go on to the next one. We will go ahead, you have already made your exceptions and objections to them the other night – last night when we went over the charges after we left and courtroom. And these are the ones that you gentlemen submitted to me. Whether you agree with them or not, do you agree these are the ones that you submitted?

MR. LINK: Yes, sir.

THE COURT: Mr. Greene, you also agree these are the ones you submitted?

MR. GREENE: Yes, sir.

* * *

[1963] A Yes, sir.

Q You left that out in giving the testimony to him; hadn't you?

A No, I just didn't think about it.

Q Didn't think about it?

A No, sir.

Q All you have done for the last year is think about this; isn't it?

A I thought about it; yes.

Q You are well coached; aren't you?

A No, sir.

Q He's been coaching you day in and day out; hasn't he?

A He's talked to me, he hasn't been coaching me.

Q He even talked to you today during the recess; didn't he?

MR. LINK: He's commenting on the rule of Defense Counsel.

THE COURT: Excuse me?

MR. LINK: I think this is improper comment at this point.

THE COURT: I think he's asking whether or not he had an opportunity to go over his testimony. I don't think that is improper.

BY MR. GREENE:

[1964] Q You even talked to him during the recess a little while ago; didn't you?

A Yes, sir, I did.

MR. LINK: I have to object at this point and I would object and I would move for a mistrial.

MR. AUSTIN: Your Honor, he worked on us for talking to witnesses all through the trial, we got a right to make these inquiries.

THE COURT: Counsel, what is the distinction between the questions you asked?

MR. LINK: May we approach the bench? I can explain.

THE COURT: Excuse me?

MR. LINK: If we could approach the bench I could explain.

(The following further side-bar conference was had out of the hearing of the jury:)

MR. LINK: I would object and move for a mistrial at this time. The Prosecution making – is making a comment on the rule of Defense Counsel and they are cross examining the defendant about the communications with his attorney. That, I submit, is very similar to commenting upon the defendant's right to remain silent. There's a defense that is the same.

THE COURT: I am sorry. I missed the last part.

[1965] MR. LINK: That is the same as commenting upon his right to remain silent. I think It's analogous.

He's trying to use the fact that he's represented by an attorney against him, the fact he's talked with an attorney, his absolute right to consult with counsel. And the fact that he's asked for an attorney, the fact he's consulting with an attorney is clearly irrelevant to any issue in this case and cannot be used against him. It is a constitutional right that cannot be used against him during the course of the trial.

The fact that he's consulted with an attorney during the recess, he has an absolute right to do that according to the law – case law. And it cannot be used against him during a trial that he has availed himself of that. I would object to it and move for a mistrial based upon those comments.

MR. GREENE: That's incredible. He's just like any other witness when he is on the witness stand.

THE COURT: Well, Counsel, do I understand that you have a right to ask anyone and all State witnesses if they've conferred with Mr. Greene or the Prosecution, and if he's gone over their testimony and talked to them and told them not to change their story, that you can ask those questions of the State witnesses, but they can't ask similar questions of a Defense witness?

[1966] MR. LINK: Of the defendant; yes, sir.

THE COURT: What is the distinction again, now?

MR. LINK: Those people had no right – have no right to counsel. I was not commenting upon their right to counsel in any way, shape or form.

THE COURT: And it's your felling, then, that you can comment upon them talking to their witnesses, but they cannot while the defendant is a witness, they cannot ask the same questions of him?

MR. LINK: Yes, sir.

THE COURT: Deny the motion. Deny the motion for mistrial. Overrule the objection.

(At the conclusion of the side-bar conference the following further proceedings were had in the presence of the jury:)

BY MR. GREENE:

Q You have talked to him hundreds of times; haven't you?

A Yes, sir, several times.

Q Several; three?

A No, sir.

Q More like a hundred.

A Probably.

* * *

JACKSONVILLE,
FLORIDA
MARCH 9, 1983

STATE OF FLORIDA

vs.

ROBERT L. PARKER

IN THE CIRCUIT COURT,
IN AND FOR DUVAL
COUNTY, FLORIDA

DIVISION S

CASE NO. 82-1658CF

INFORMATION FOR
MURDER IN THE
FIRST DEGREE

[R.409-11]

VERDICT AS TO FIRST COUNT – (RICHARD PADGETT)

__X__ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE FIRST DEGREE.

_____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE SECOND DEGREE.

_____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE THIRD DEGREE.

_____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MANSLAUGHTER.

_____ WE, THE JURY, FIND THE DEFENDANT NOT GUILTY.

SO SAY WE ALL,

/s/ Richard A. Levinson
FOREMEN

JACKSONVILLE,
FLORIDA
MARCH 9, 1983

STATE OF FLORIDA

vs.

ROBERT L. PARKER

IN THE CIRCUIT COURT,
IN AND FOR DUVAL
COUNTY, FLORIDA

DIVISION S

CASE NO. 82-1658CF

INFORMATION FOR
MURDER IN THE
FIRST DEGREE

VERDICT AS TO SECOND COUNT –
(NANCY SHEPPARD)

__X__ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE FIRST DEGREE.

_____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE SECOND DEGREE.

_____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE THIRD DEGREE.

_____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MANSLAUGHTER.

_____ WE, THE JURY, FIND THE DEFENDANT NOT GUILTY.

SO SAY WE ALL,

/s/ Richard A. Levinson
FOREMEN

JACKSONVILLE,
FLORIDA
MARCH 9, 1983

STATE OF FLORIDA

vs.

ROBERT L. PARKER

IN THE CIRCUIT COURT,
IN AND FOR DUVAL
COUNTY, FLORIDA

DIVISION S

CASE NO. 82-1658CF

INFORMATION FOR
MURDER IN THE
FIRST DEGREE

VERDICT AS TO THIRD COUNT –
(JODY DAWN DALTON)

____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE FIRST DEGREE.

____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE SECOND DEGREE.

__X__ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MURDER IN THE THIRD DEGREE.

____ WE, THE JURY, FIND THE DEFENDANT GUILTY OF MANSLAUGHTER.

____ WE, THE JURY, FIND THE DEFENDANT NOT GUILTY.

SO SAY WE ALL,

/s/ Richard A. Levinson
FOREMEN

JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO. 82-1658CF

DIVISION S

[R.434-5]

STATE OF FLORIDA

vs.

ROBERT L. PARKER

ADVISORY SENTENCE AS TO FIRST COUNT –
(RICHARD PADGETT)

We, the jury, rendering an advisory sentence to the Court as to whether the defendant should be sentenced to life imprisonment without the possibility of parole for 25 years or to death, find:

1. Sufficient aggravating circumstances

   __X__ do

   _____ do not

   exist to justify a sentence of death.

2. Sufficient mitigating circumstances

   __X__ do

   _____ do not

   exist, which outweigh any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.

3. Based on those considerations,

   A. __X__ Six or more members of the jury advise and recommend to the Court that the

defendant be sentenced to life imprisonment without the possibility of parole for 25 years.

B. ____ The majority of the members of the jury advise and recommend to the Court that the defendant be sentenced to death.

DATED March 14, 1983.

/s/ Richard A. Levinson
FOREMEN

JUDICIAL CIRCUIT, IN AND FOR DUVAL COUNTY, FLORIDA

CASE NO. 82-1658CF

DIVISION S

STATE OF FLORIDA

vs.

ROBERT L. PARKER

ADVISORY SENTENCE AS TO SECOND COUNT - (NANCY SHEPPARD)

We, the jury, rendering an advisory sentence to the Court as to whether the defendant should be sentenced to life imprisonment without the possibility of parole for 25 years or to death, find:

1. Sufficient aggravating circumstances

__X__ do

____ do not

exist to justify a sentence of death.

2. Sufficient mitigating circumstances

__X__ do

____ do not

exist, which outweigh any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.

3. Based on those considerations,

A. __X__ Six or more members of the jury advise and recommend to the Court that the defendant be sentenced to life imprisonment without the possibility of parole for 25 years.

B. ____ The majority of the members of the jury advise and recommend to the Court that the defendant be sentenced to death.

DATED March 14, 1983.

/s/ Richard A. Levinson
FOREMEN

IN THE CIRCUIT COURT, FOURTH
JUDICIAL CIRCUIT, IN AND FOR
DUVAL COUNTY, FLORIDA

CASE NO. 82-1658CF

DIVISION S

STATE OF FLORIDA

vs.

ROBERT L. PARKER

SENTENCE
OF
ROBERT L. PARKER

The defendant, Robert L. Parker, age 28, of 2710 Parrish Cemetery Road, Jacksonville, Florida, an admitted drug dealer and user, was convicted on March 9, 1983, of three counts of murder, as follows:

FIRST DEGREE MURDER of
Richard Allen Padgett, Age 23,
11550 Old Plank Road
Jacksonville, Florida

FIRST DEGREE MURDER of
Nancy Lee Sheppard, Age 17,
5700 Solomon Road
Jacksonville, Florida

THIRD DEGREE MURDER of
Jody Dawn Dalton, Age 21,
8510 Roosevelt Boulevard
Jacksonville, Florida

A Presentence Investigation Report with supplement (hereafter referred to as the PSI) has been provided to the Court and the defense, and the case was passed to this date for sentence.

I. INDICTMENT

The defendant was charged by original Indictment on February 25, 1982, and amended indictment on August 26, 1982, as follows:

"IN THE NAME OF AND BY AUTHORITY OF THE STATE OF FLORIDA

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge that ROBERT L. PARKER on or between the 6th day of February, 1982, and the 7th day of February, 1982, in the County of Duval and State of Florida, unlawfully and from a premeditated design to effect the death of RICHARD PADGETT, did then and there kill the said RICHARD PADGETT by shooting him with a pistol and stabbing him with a knife, contrary to the provisions of Section 782.04, Florida Statutes.

SECOND COUNT

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge for a second count that ROBERT L. PARKER on or between the 6th day of February, 1982, and the 7th day of February, 1982, in the County of Duval and State of Florida, unlawfully and from a premeditated design to effect the death of NANCY SHEPPARD, did then and there kill the said NANCY SHEPPARD by shooting her with a pistol and stabbing her with a knife, contrary to the provisions of Section 782.04, Florida Statutes.

THIRD COUNT

The Grand Jurors of the State of Florida and County of Duval, empaneled and sworn to inquire and true presentment make in and for the body of the County of Duval, upon their oaths, do present and charge for a third count that ROBERT L. PARKER on or between the 6th day of February, 1982, and the 7th day of February, 1982, in the County of Duval and State of Florida, unlawfully and from a premeditated design to effect the death of JODY DAWN DALTON, did then and there kill the said JODY DAWN DALTON by shooting her with a pistol, contrary to the provisions of Section 782.04, Florida Statutes."

2. EXPLANATION

This defendant, ROBERT PARKER, was charged with three co-defendants, ELAINE PARKER (Robert Parker's former wife), TOMMY GROOVER and WILLIAM LONG – with the first degree murders of Richard Padgett, Nancy Sheppard and Jody Dalton.

Elaine Parker and William Long previously entered into negotiated pleas with the prosecution whereby they pleaded guilty to murder in the second degree – and are yet to be sentenced. Long testified for the prosecution in the separate trials of Tommy Groover and Robert Parker.

In February of 1983 Tommy Groover was convicted of three counts of murder in the first degree and sentenced by me to death on two counts and life imprisonment without the possibility of parole for 25 years on the third count.

The actions of all of the co-defendants are so intertwined in the murders that it is necessary to refer to them in this sentence of Robert Parker.

Hereafter Robert Parker will be referred to as "defendant" or "Parker", Elaine Parker will be referred to as "Elaine", Tommy Groover will be referred to as "Groover", and William Long as "Long".

3. FACTS OF MURDERS

The facts and circumstances of these three murders are so senseless and vicious as to be almost unbelievable – yet they did happen, and three young people are dead.

The evidence at trial was that Parker was a drug dealer and Groover sold drugs for him. Groover owed Parker money for drugs he had sold to Richard Padgett and others. The day before the homicidal events began, Parker placed a rope over a tree limb and told Groover he would hang him if he did not pay the drug debt.

The day of the homicides Parker again threatened to kill Groover if he did not get the money. Later that day Groover, accompanied by Long, located Richard Padgett and his 17-year old girlfriend, Nancy Sheppard, in a nightclub. When Padgett was unable to pay the drug debt, Groover induced Padgett and the girl to accompany Long and himself to the house trailer occupied by Parker and his former wife, Elaine.

Padgett informed Parker and Groover that he did not have money to pay the drug debt – but that he could get money from some of his debtors.

Parker and Padgett went outside the trailer for further discussion – during which a shot was fired. As Parker and padgett returned to the trailer, Parker was carrying a pistol in his belt. Nancy was alarmed at this turn of events and offered her necklace and ring in payment of Padgett's debt – but the offer was refused. Long then drove Nancy Sheppard to her home. Parker (armed with a pistol), Groover, Elaine and Richard Padgett set off in the Parker car in a desperate, but unsuccessful, effort by Padgett to collect money with which to pay the drug debt. Then Padgett was taken to the junkyard of Parker's father – where Groover and Padgett engaged in a fist fight. Parker, Groover and Elaine then drove Padgett to a deserted area in the Yellow Water section of Duval County. The three men exited the car and Padgett fell to his knees and begged mercy. Groover shot Padgett to death as Parker aided and abetted the murder. The two men then dumped Padgett's body in a water-filled ditch. Thus was Murder #1 committed.

Then Parker, Groover and Elaine returned to the junkyard where they melted down the gun, looked for blood on their clothes, cleansed themselves and went to a bar.

At the bar they met Jody Dalton, 21, with whom Groover had previously had an intimate relationship. Ms. Dalton unwisely decided to accompany them – whereupon Parker, Groover, Elaine and Ms. Dalton left the bar and drove to a secluded area where the melted gun was tossed into the river. Unfortunately, for her, Ms. Dalton witnessed the gun disposal. All four then drove to the Parker home where they left Ms. Dalton at approximately 2:00 a.m. Then Parker, Groover and Elaine drove to the residence of Joan Bennett and invited her to pay a social visit to the

Parker abode. Ms. Bennett, having nothing better to do at that early hour, accompanied them.

Upon their return Parker was outraged to find that Ms. Dalton had partaken of some of his drugs in the trailer home. After a heated discussion, some rope and concrete blocks were taken from the Parker property and placed into the car – and Ms. Dalton was invited to a night-time outing at a secluded and isolated area known as Donut Lake.

As Parker, Groover, Elaine, Ms. Dalton and Ms. Bennett drove to the Lake, Ms. Dalton performed fellatio upon Groover. After this romantic interlude, Ms. Bennett overheard Parker and Groover discuss "getting rid" of Ms. Dalton.

At the Lake Ms. Dalton was stripped of her clothes, taunted, kicked and beaten as she begged for mercy then Groover shot her to death as Parker aided and abetted the murder. The two men tied up the body with the rope and concrete blocks and sunk her into the Lake. Thus was Murder #2 committed.

On the trip back to the Parker manse, Parker and Groover discussed killing Ms. Bennett because she had witnessed the Dalton Murder. However, Elaine assured them of Ms. Bennett's discretion and trustworthiness – which assuaged their fears and they drove Ms. Bennett home. Then, Parker, Groover and Elaine concluded that Nancy Sheppard would link them with Padgett's death and therefore she too had to die. The three then proceeded to the home of Long so that he could direct them to Nancy's residence. Long, who had just returned home from a

nightlong tryst with a ladyfriend, did not wish to accompany the trio – but finally agreed because only he knew the, location of Nancy's home. Long, who was unaware of their plan to murder the girl, got into the car and gave, directions – and at length they arrived at the Sheppard residence.

At the urging of Parker and Groover, Elaine went into the house and tricked Nancy into the car by telling her they would take her to visit Richard Padgett. As Parker, Groover, Elaine, Long and Nancy rode in the car, Parker told Nancy that "Richard is out in the woods wandering around high, wants to see you".

At one point the car stopped and Parker ordered Long out of the car. Parker, Groover and Long walked a distance from the car and Parker asked Long if he knew what was going on – to which Long replied, no. Then Parker and Groover chortled gleefully and said, "Well, you will in a few minutes".

They got back into the car and continued a short distance when the car stopped again and Parker ordered Long out. Parker led Long to the ditch and showed him Padgett's dead body. Then Parker said "You know what's going on now?" Long replied "No, I sure don't."

Parker then told Long either you kill Nancy or I will kill you. Long, who had been shot by Parker in 1980, (see criminal record and explanation, page 9 & 10 herein) had good reason to fear Parker's violence and took him at his word.

Parker led the innocent and unsuspecting young Nancy to the ditch where she saw Padgett's body, fell to her knees and screamed "Oh, my God."

Elaine then handed Long a pistol and said "You better do it or he'll kill you too." Long shot Nancy in the head and as Parker and Groover screamed "shoot her again, she's still breathing", he shot her twice more.

Parker grabbed the dead or dying girl's head in one hand and cut her throat with a knife and then took her necklace and ring.

After they returned to the car Parker said to Long, "Now, you're in it with us, you're in it with us". Then he volunteered to give Long some drugs. Thus was Murder #3 committed.

All three murders were brutal, senseless and savage, but the shooting and throat-cutting and robbery of the helpless 17-year old girl was so heartless and atrocious as to indicate a murderer without conscience or pity.

4. CRIMINAL RECORD

The Sheriff's Office records and the PSI show the defendant's adult criminal record as follows:

"ADULT:

PLACE	DATE	CHARGE	DISPOSITION
Jax, FL	8/10/73	Breach of Peace	Nolle Prossed
		Disorderly Intoxication	Nolle Prossed
		Discharging Firearm	Nolle Prossed
		Unnecessary Noise	$10.00 fine
Jax, FL	5/18/74	Burglary	Fined $101.00
		Assault	
Jax, FL	4/12/75	Trespass	Dropped
		Resisting Arrest Without Violence	$50.00 fine
Jax, FL	7/15/76	Possession of Controlled Substance	Dropped
Jax, FL	11/6/75	Disorderly Intoxication	$25.00 plus $2.00 fine
		Public Profanity	Nolle Prossed
Jax, FL	10/21/79	Discharging Firearm	Dropped
		Disorderly Intoxication	$25.00 plus $2.00 fine

JAX, FL**	2/23/80	AGGRAVATED BATTERY	1 YEAR DUVAL COUNTY JAIL AFTER SERVING 6 MONTHS, PLACED ON 1 YEAR PROBATION
		POSSESSION OF FIREARM	DROPPED
Jax, FL	11/2/80	Careless Driving	Discharged
		Driving While Intoxicated	Nolle Prossed
Jax, FL	6/30/81	Disorderly Intoxication	$25.00 plus $4.25 fine
		Opposing a Police Officer	$25.00 plus $14.25 fine
Jax, FL	8/20/81	Disorderly Intoxication	$175.00 plus $10.00 fine $8.75 fine
Jax, FL	1/24/82	Reckless Driving	60 days N.P.T.
Jax, FL	1/24/82	Breach of Peace	60 days N.P.T.
		Resisting Arrest with Violence	Nolle Prossed
		Assault on Law Enforcement Officer	Nolle Prossed
Jax, FL	2/11/82	Murder 1st Degree (3 counts)	Instant Offense"

** The supplement to the PSI shows that the victim of the aggravated assault was William Long – who was shot by Parker, as follows:

"According to the Jacksonville Sheriff's Office report dated February 23, 1980, the subject along with Frank Douglas Bradley entered the residence at 7806 Lennox Avenue where William Long was a dinner guest. William Long and David McDonald became involved in a discussion with Robert Parker and Frank Bradley. Robert Parker wanted Long and McDonald to help him and Bradley to do bodily harm to another individual. When Long and McDonald refused to cooperate, Parker became upset and an argument developed. Parker then slapped Long on the face and then shot Long in the left shoulder. Both Parker and Bradley then fled in Parker's vehicle. Officers Adams, French and Phillips observed Parker's vehicle northbound on Parrish Cemetery Road. The listed officers stopped the vehicle in the 10,000 block of Normandy Boulevard and both Parker and Bradley were apprehended by these officers. This time the subjects were advised of their rights and transported to the Duval County Jail."

5. COMMENT OF COURT

These three murders establish a landmark of sorts. They are the first convictions of wholesale slaughter in this circuit as a consequence of an illegal drug operation.

Tommy Groover, who was charged with Parker in these three murders, was tried first and convicted on January 8, 1983. He was the first defendant to be convicted of three first degree murders in this circuit since the re-enactment of the capital punishment law, and before that for such a long period of time that memory fails to reveal a similar triple first degree conviction.

This historical fact is significant because these murders are a direct result of the drug culture which has spread over this state and nation like an evil plague.

Crime had advanced to another plateau with the coming of the drug plague. Homicides are more wanton, vicious and numerous – it is slaughter on a grand scale.

These murders and the sentences imposed on this convicted murderer should be a horrifying and stunning reminder of the monumental stupidity of using and dealing in illegal drugs.

With the exception of Nancy Lee Sheppard – all of the victims and defendants were either drug dealers or users, and young Nancy was murdered because of her association with them.

This lesson must be learned: illegal drug use is a certain path to moral, physical and emotional ruin and possible death – not only to those who use drugs but also to those who associate with them.

6. ALL EVIDENCE CONSIDERED BY COURT

Before imposing sentence, this Court has carefully studied and considered all the evidence and testimony at trial and at advisory sentence proceedings, the presentence Investigation Report, the applicable Florida Statutes, the case law, and all other factors touching upon this case.

The following is a summarization and analyzation of each of the statutory aggravating and mitigating circumstances – in reverse order.

7. SUMMARIZATION OF STATUTORY MITIGATING CIRCUMSTANCES (F.S. 921.141(6))

A. THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY.

FACT:

As an adult the defendant has been arrested 13 times and has been charged with 26 separate crimes. He has been convicted of 10 misdemeanors and one felony.

FACT:

The defendant's felony conviction is for his shooting of William Long in 1980. William Long is the person who shot Nancy Sheppard after the defendant threatened to kill him if he did not shoot her.

CONCLUSION:

This is not a mitigating circumstance under this paragraph because the defendant does have a significant history of prior criminal activity.

B. THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

FACT:

The defense attorney did have defendant examined under Rule 3.216(A) (EXPERT TO ASSIST COUNSEL IN PREPARING DEFENSE). Dr. James Larson, a psychiatrist, was appointed and did examine the defendant and gave his confidential report to defense counsel.

The defense did not file a defense of insanity, Dr. Larson did not testify for defendant at trial,

nor did any expert or lay person testify that defendant was under the influence of extreme mental or emotional disturbance at the time of the three murders.

FACT:

The defendant testified in his own behalf and while he blamed others for the murders, he did not claim mental or emotional disturbance at the time of the crimes.

FACT:

The testimony and evidence at trial was that defendant was running a drug operation and that the three murders were the direct consequence of his efforts to collect drug debts. The sequence of murders and the scenario of each were orchestrated by the defendant who was in full control of his faculties without extreme mental or emotional disturbance.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

C. THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT.

FACT:

Neither Nancy Sheppard, Richard Padgett or Jody Dalton were in any way participants in defendant's conduct. Each of the victims had either been tricked, lured or kidnapped to the place of murder.

Both Padgett and Dalton had begged and pleaded for their lives and Sheppard was shot in the back of the head as she knelt over Padgett's dead body.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

D. THE DEFENDANT WAS AN ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR.

FACT:

The evidence showed that this defendant was the ringleader of a drug operation and that the homicidal events started when defendant made threats of death to enforce payment of drug debts. His participation was major in every sense as shown by evidence at trial – as follows:

A. Defendant, Groover and others met at defendant's house to plan strategy.

B. Groover took Richard Padgett to defendant's house in effort to collect money for defendant.

C. The homicidal rampage started out from defendant's house.

D. The murderers returned to defendant's house after each murder.

E. Defendant's pistols were used in the three murders.

F. Defendant threatened to kill Groover if he did not get drug money.

G. Defendant threatened and intimidated others but was himself never threatened.

H. Defendant was the person to whom drug debts would be paid when collected.

I. Defendant was the person who was angry with Jody Dalton because she used his drugs without his permission.

J. The rope and concrete blocks used to tie and weight Jody's body were taken from defendant's property.

K. Before Richard Padgett was murdered, he was taken to defendant's father's junkyard and beaten.

L. After the Padgett murder, defendant and Groover returned to defendant's father's junkyard to melt down the gun.

M. Defendant was so secure in his own safety and so in control of events that he took his former wife along on all three murders.

N. Defendant's former wife lured Nancy Sheppard out of her home to be murdered.

O. Defendant's car was used throughout the murders.

P. Defendant was present aiding, abetting, encouraging and directing all three murders.

Q. Defendant threatened to kill William Long if he didn't shoot Nancy Sheppard.

R. Defendant cut Nancy Sheppard's throat and took her ring and necklace.

FACT:

The defendant's participation was major and predominant in all three of the murders.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

E. THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

FACT:

The defendant claimed that he acted under extreme duress and that he was in fear of Groover – but other than his own testimony – the evidence was to the contrary. Witnesses stated that defendant and Groover were friends of long standing and that Groover sold drugs for defendant. This defendant is the person who had guns and was armed most of the time and he is the person who repeatedly threatened to kill Groover.

Witnesses testified that this defendant is the person they feared because of his propensity for violence, because he had shot Long in the past, and because he was always armed.

The evidence at trial refutes defendant's contention of duress and/or dominance of Groover or any other person.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

F. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

FACT:

Never, at any time, was it contended that the defendant was insane or incompetent at the time

of the crime or at trial – nor was there any evidence or testimony that he was substantially impaired in his ability to appreciate the criminality of his conduct or to conform it to the requirements of the law.

FACT:

The defendant not only appreciated the criminality of his conduct – but acting on that appreciation, he murdered two other persons to prevent disclosure of the first murder.

FACT:

The defendant melted the murder gun, burned physical evidence, murdered Nancy Sheppard so she could not link him to the Padgett murder, and murdered Jody Dalton because she had seen the disposal of the murder weapon – all of which clearly shows the defendant appreciated the criminality of his conduct.

Although the defendant was examined by his private psychiatrist, there was no testimony or evidence that his ability to conform his conduct to the requirements of the law was substantially or even slightly impaired.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

G. THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

FACT:

The defendant was 28 years old at the time he murdered 17-year old Nancy Sheppard, 21-year old Jody Dalton, and 23-year old Richard Padgett.

FACT:

The defendant's chronological age was 28 years at the time of the murders. However, in life experience and maturity he was much older.

FACT:

He had married at age 16; had fathered two children; had divorced, remarried and divorced again.

FACT:

The defendant had been on his own since the age of 16 when he married. He had worked 9 years as a car paint and body man, as a hospital orderly and was an admitted drug dealer.

FACT:

The defendant had been arrested 13 times, had been convicted of 10 misdemeanors and one felony and had served a number of jail terms.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

7. SUMMARIZATION OF STATUTORY AGGRAVATING CIRCUMSTANCES (F.S. 921.141(5))

A. THE CAPITAL FELONY WAS COMMITTED BY A PERSON UNDER SENTENCE OF IMPRISONMENT.

FACT:

This does not apply to the present case.

CONCLUSION:

There is no aggravating circumstance under this paragraph.

B. THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON.

FACT:

On February 23, 1980, the defendant was convicted of Aggravated Battery for shooting William Long (see criminal record Pages 9 & 10 herein). This is, of course, a conviction of a felony involving the use of violence to a person.

FACT:

In the present case the defendant was convicted on March 9, 1983, of the first degree murder of Richard Padgett and Nancy Sheppard and the third degree murder of Jody Dalton. Thus, defendant has been convicted of two capital crimes and one felony involving the use of violence to a person. Although the convictions were obtained on the same day – they are separate and not fused. Therefore, each is an aggravating circumstance to the first degree murders. (*Elledge v. State*, 348 So.2d 998 and *King v. State*, 390 So.2d 315)

CONCLUSION:

There is an aggravating circumstance, under this paragraph as to the Padgett and Sheppard murders for the reason that defendant has been previously convicted of another capital felony – and has been convicted of two other felonies involving violence to a person.

C. THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

FACT:

The defendant was present, aiding and abetting the murders of Richard Padgett and Jody Dalton

and he forced William Long to shoot Nancy Sheppard. By participating in those murders and by making threats to kill Long and Joan Bennett – he has murdered three people and placed two others in great risk of death.

CONCLUSION:

It cannot be said with certainty that he created a great risk of death to "many" persons – because the exact legal meaning of that term is not known. Therefore, this is not an aggravating circumstance.

D. THE CAPITAL FELONY WAS COMMITTED WHILE DEFENDANT WAS ENGAGED, OR WAS AN ACCOMPLICE, IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, OR AIRCRAFT PIRACY OR THE UNLAWFUL THROWING, PLACING, OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB.

FACT:

The defendant took Richard Padgett to a junkyard where he, was beaten and threatened with a gun, and then to a deserted area where he was murdered.

Padgett was forcibly – and by the use of threats – secretly confined, and abducted by defendant against his will and without lawful authority – with the intent to inflict bodily harm upon him or to terrorize him – or to commit the felony of murder upon him.

The actions of defendant in kidnapping and abducting Padgett come squarely within the

definition of kidnapping as set forth in Florida Statute 787.01.

FACT:

The defendant tricked Nancy Sheppard out of her home into a wooded area where she was murdered and robbed of her necklace and ring by the defendant.

The capital felony of murder was committed in the course of the robbery and this crime comes within the definition of this aggravating circumstance.

CONCLUSION:

There is an aggravating circumstance for the reason that defendant committed murders while he was engaged in the kidnapping of Richard Padgett and the robbery of Nancy Sheppard.

E. THE CAPITAL FELONY WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.

FACT:

The murder of Nancy Sheppard was to prevent her from linking the defendant with the murder of her boyfriend, Richard Padgett – and thus to prevent and/or avoid the defendant's lawful arrest for that murder.

CONCLUSION:

There is an aggravating circumstance under this paragraph in the Sheppard Murder.

F. THE CAPITAL FELONY WAS COMMITTED FOR PECUNIARY GAIN.

FACT:

All three murders were committed as the result of the stated intent of the drug dealer-defendant to kill if he did not collect money owed him for drugs.

FACT:

The defendant threatened and forced William Long to shoot Nancy Sheppard – and then defendant cut her throat and took her ring and necklace.

CONCLUSION:

There is an aggravating circumstance under this paragraph as to the, Sheppard and Padgett murders.

H. THE CAPITAL CRIME WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL.

FACT:

The defendant abducted and kidnapped Richard Padgett. He was present, aiding and abetting as Padgett was beaten and shot to death while on his knees begging for mercy.

FACT:

The events of that fateful evening lasted for hours as Padgett desperately tried to save his own life. He endured threats with a loaded pistol, physical beating and abuse, and went through tortuous hours before he was finally shot in the head by the defendant.

During the agonizing hours of his abduction, Padgett knew his fate was sealed – and was

especially aware of it as he was driven to his place of execution; so certain was he, that he fell to his knees and begged for mercy. His terror was magnified as a pistol was pointed at his head and snapped three or four times before it finally fired.

The defendant and Groover toyed with their victim for hours – as a cat with a mouse. The severe and continuous emotional strain of Padgett was cruel, heinous and atrocious in the extreme.

FACT:

Nancy Sheppard had just turned 17 the day before she was murdered. The defendant lured her out of her home and away from her family on the pretense of taking her to her boyfriend, Richard Padgett.

Once they arrived at the, murder scene, the defendant led the, innocent young girl to the water-filled ditch and showed her the dead body of Richard Padgett. She fell to her knees and sobbed, "Oh, my God". The defendant then ordered William Long to shoot Nancy or himself be killed. As Nancy kneeled over Padgett's body, Long shot her. The defendant screamed "shoot her again, shoot her again". Then the defendant grabbed the young girl's head and cut her throat – after which he took her ring and necklace.

The severe emotional strain upon such a child of tender years as she knelt frightened and helpless over the dead body of her boyfriend must have been excruciating.

CONCLUSION:

If the murders of Nancy Sheppard and Richard Padgett – under such excruciating circumstances – were not especially heinous, atrocious and

cruel, then new meaning must be given to those terms which transcend the present understanding of them. This is an aggravating circumstance in the Sheppard and Padgett murders.

I. THE CAPITAL FELONY WAS A HOMICIDE AND WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

FACT:

The defendant took Richard Padgett to a junkyard where he was beaten, threatened with a pistol, abducted and taken to a deserted road in the woods where he was executed while on his knees begging for mercy. The execution of Padgett was cold, calculated and premeditated in every sense. The only reason for this murder was the non-payment of a drug debt – which is certainly not moral or legal justification.

FACT:

Young Nancy Sheppard was lured from her home by the defendant and taken to the woods and shot. The defendant then cut her throat and robbed her of her jewelry. She was murdered to prevent her from incriminating the defendant. There is no moral or legal justification for this cold, calculated, premeditated and pitiless murder.

CONCLUSION:

There is an aggravating circumstance under this paragraph as to both the Sheppard and Padgett murders.

9. FINDINGS OF THE COURT

A. There are one or more aggravating circumstances in the first count (Padgett murder) and the second count (Sheppard murder) which have been established beyond a reasonable doubt.

B. There are no mitigating circumstances that outweigh the aggravating circumstances in the first count (Padgett murder) and the second count (Sheppard murder).

C. That the appropriate sentence of the defendant in the second count is death.

D. That the appropriate sentence in the first count is life imprisonment without the possibility of parole for 25 years.

E. The maximum sentence for the third degree murder of Dalton (third count) is 15 years' imprisonment. Such maximum sentence is an appropriate sentence in the third count.

10. AUTHORITY FOR SENTENCE

That under Florida law the Judge sentences a defendant convicted of Murder in the First Degree either to death or life imprisonment. This is an awesome burden to be placed upon the Judge – but the landmark Florida case *State v. Dixon*, 283 So.2d 1, the Florida Supreme Court said that when such discretion can "be shown to be reasonable and controlled, rather than capricious and discriminatory, then it meets the test of *Furman v. Georgia*, 408 U.S. 238".

That the case of *Tedder v. State*, 332 So.2d 908, sets this test:

> "In order to sustain a sentence of death following the jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

It is suggested that the facts and circumstances show that this test has been fully met.

10. SENTENCE

You, ROBERT L. PARKER, having been found guilty of murder in the first degree on the First and Second Counts and third degree murder on the Third Count - I hereby adjudge you to be guilty on each count. It is the Judgment and Sentence of the Court as follows:

1. On the Second Count, I sentence you to death. I order that you be taken by the proper authorities to the Florida State Prison and there kept in close confinement until the date of your execution be set. That on such date you be put to death by having electrical currents passed through your body in such amounts and frequency until you are rendered dead.

2. On the First Count, I sentence you to life imprisonment without the possibility of parole for twenty-five years. I order that you be taken by the proper authorities to the Florida State prison and there to serve such term.

3. On the Third Count, I sentence you to the maximum term of 15 years' imprisonment. I order that you be taken by the proper authorities to the Florida State Prison and there serve such term.

4. The sentence in the First Count shall run consecutively to the sentence in the Second Count. The sentence in the Third Count shall run consecutively to the sentences in the First and Second Counts.

I advise you that you have thirty (30) days from this date in which to take an appeal. Should you fail to take an appeal within 30 days, then you waive, forfeit and give up such right of appeal.

The Office of the Public Defender is hereby appointed to represent you on any such appeal.

May God have mercy upon your soul.

DONE AND ORDERED AND SENTENCED in Open Court, at the Duval County Courthouse, Jacksonville, Florida, on April 29, 1983.

/s/ R. Hudson Olliff
R. HUDSON OLLIFF,
CIRCUIT JUDGE

Copies:

Honorable T. Edward Austin
Ralph N. Greene, II, Esquire
Robert J. Link, Esquire

Supreme Court of Florida.

Robert Lacey PARKER, Appellant,

v.

STATE of Florida, Appellee.

No. 63700

Sept. 6, 1984.

Rehearing Denied Dec. 3, 1984.

PER CURIAM.

Appellant was tried on three counts of first-degree murder. A jury found him guilty of first-degree murder on two counts and of third-degree murder on the other and recommended a sentence of life on each of the first-degree murder convictions. The trial judge overrode the jury recommendation on one of the convictions and imposed the death penalty. We have jurisdiction to review the convictions and the imposition of the death penalty pursuant to article V, section 3(b)(1), Florida Constitution. We affirm both the convictions and the sentence.

Parker was charged with first-degree murder in the deaths of Richard Padgett, Jody Dalton and Nancy Sheppard. The state introduced evidence at trial that Parker was a drug dealer and Tommy Groover sold drugs for him. Groover had allegedly fronted some drugs to Padgett. When Groover was unable to pay Parker, Parker allegedly threatened to hang Groover unless the debt was satisfied. Testimony indicated Parker was of a violent temperament, had possession of firearms and was irritated over the drug debt. Uncontroverted evidence

showed that Padgett was located at a bar, taken to Parker's junkyard and beaten by Groover and driven into the woods and shot by Groover. Later that same evening, Groover beat and shot Jody Dalton and Parker helped weight her body and sink it in a lake. Finally, Nancy Sheppard, Padgett's seventeen-year-old girlfriend, was lured from her home and taken to the ditch where Padgett's body had been left. She was killed by Billy Long, who testified that he was ordered to kill her by Parker, who threatened to kill him in her place unless Long complied. Parker then took Sheppard's necklace and ring from her body.

Parker did not deny being present during these events, but he testified in his own behalf that he had been an unwilling accomplice, forced into cooperation by Groover's threats against Parker's family. He further claimed to have had no indication that Groover planned to kill Padgett or Dalton and that these murders were not part of any common scheme or in furtherance of any common goal. On the contrary, Parker claimed friendship with Padgett and disclaimed more than the slightest acquaintance with either of the women.

The jury convicted Parker of third-degree murder in the death of Jody Dalton and first-degree murder in the Padgett and Sheppard homicides. The jury recommended life imprisonment on both first-degree convictions. The trial judge sentenced Parker to life in the Padgett killing, but he imposed the death penalty for the Sheppard murder.

Appellant raises twenty issues as assignments of error in the guilt phase. All have been considered in

depth and found insufficient to require reversal. We find it necessary to discuss only three at any length.

First, Parker contends that the Padgett murder was an independent act of Tommy Groover's, and the trial court erred in denying Parker's request for a jury instruction on the independent act of a co-felon, citing *Bryant v. State*, 412 So.2d 347 (Fla.1982). It is true that an act in which a defendant does not participate and which is "outside of and foreign to, the common design" of the original felonious collaboration may not be used to implicate the nonparticipant in the act. 412 So.2d at 349. Where any evidence which would support the theory of independent act has been presented, the defendant is entitled to the jury instruction. We do not find any evidence on the record which would require the instruction.

In *Bryant*, the defendant had agreed to help burgle a supposedly empty apartment. Upon entering the apartment, the defendant discovered the victim to be present – bound hand and foot, naked on the floor. The defendant admitted to retying the victim and moving him to the bed, but he testified that when he left the apartment fifteen minutes later the victim was alive and had not been sexually assaulted. The victim's dead body was later discovered; he had been violently assaulted anally and strangled with a necktie.

Bryant is clearly distinguishable from the present case even when all the evidence presented is viewed in the light most favorable to Parker. In *Bryant* the defendant did not participate in creating the circumstances which directly let to the victim's death. Parker, on the other hand, created the initial situation by threatening to

kill Groover if he did not reimburse Parker for drugs he had fronted to Padgett. In *Bryant*, the defendant claimed to have withdrawn entirely from the scene and to have fulfilled his role in the criminal enterprise before the rape and murder began. Parker was on the scene and was still demanding repayment when Padgett was murdered. Finally, the acts of rape and murder are not inspired by the same criminal motivation which induced Bryant's participation in a burglary for pecuniary gain. Parker, however, was, at the very least, aware that Padgett was being driven to the woods against his will as part of the ongoing terrorization for failure to pay his drug debt and to keep him from seeking reinforcements from his relatives and mounting a retributive attack on Groover and Parker. The murder was a natural and foreseeable culmination of the motivations for the original kidnapping. As a principal to the kidnapping, Parker is a perpetrator of the underlying felony and thus a principal in the homicide. *Goodwin v. State*, 405 So.2d 170 (Fla.1981). We find no error in the failure to give the requested instruction.

Of more concern is the state's advising the jury that Elaine Parker, appellant's ex-wife and a participant in the sequence of events giving rise to the murders, had pleaded guilty to one count of second-degree murder pursuant to a plea bargain. Appellant cites *Thomas v. State*, 202 So.2d 883 (Fla. 3d DCA 1967), and *Moore v. State*, 186 So.2d 56 (Fla. 3d DCA 1966), as holding that revealing a co-felon's conviction or entry of a guilty plea was impermissibly prejudicial to the fairness of the trial. We agree in principle with Judge Pearson's analysis in *Thomas*:

> As a general rule, it is improper for a prosecuting attorney to disclose during trial that another defendant had been convicted or has pleaded guilty. This is because competent and satisfactory evidence against one person charged with an offense is not necessarily so against another person charged with the same offense. Each person charged with the commission of an offense must be tried upon evidence legally tending to show his guilt or innocence.

202 So.2d at 884.

Nonetheless, while we find the revelation of Elaine's plea to be error, on the unique facts of this case we must find that error to be harmless. First, it cannot be fairly argued that placing Elaine's plea before the jury foreclosed any viable option Robert had of denying involvement. The state had assembled too many eyewitnesses to Parker's presence during and participation in the sequence of events in which the murders occurred for him to offer a defense of non-participation. Rather, he admitted his presence during and participation in all but the physical act of murder, but he defended his actions on a theory of an independent act of a co-felon in the Padgett murder and a theory of duress in the Dalton and Shepard (sic) killings. Both theories of defense rely on Parker's own subjective perceptions of the events and on his personal formulation of intent. Elaine's plea of guilty could not be construed as rebutting any portion of Robert's defense inasmuch as her perceptions and formulation of intent could not be imputed to him, nor his to her. Thus, Robert's defense was not fundamentally prejudiced because the jury knew Elaine had entered a guilty plea to a charge of second degree murder. Additionally, the trial judge included in the jury instructions a curative

admonition that a co-felon's plea should not be considered as relevant to the issue of defendant's guilt.

Finally, we must address the state's use of a police investigator to testify to a witness's reputation in the community for truth and veracity. The defense attorney argued strenuously at trial against the admission of this testimony, citing *Stripling v. State*, 349 So.2d 187 (Fla. 3d DCA 1977), *cert. denied*, 359 So.2d 1220 (Fla.1978), for the proposition that a police investigator may not be used as a witness to reputation in the community. The state countered with the argument, accepted by the trial judge, that the subject had no fixed community of residence but that he had been extensively involved with the criminal justice system and had spent the previous year in Duval County Jail. Thus, the state reasoned, the subject's "community" was the criminal justice system and the police officer, as part of that system, was a member of the community for purposes of testifying about the subject's reputation for truth and veracity. We find this construction of the rules of evidence novel but unacceptable. It has long been accepted that in the absence of sufficient contact with a community of residence to establish a reputation for truth and veracity, evidence of that reputation in another social context will be admissible. *Hamilton v. State*, 129 Fla. 219, 176 So. 89 (1937). However, we do not agree that the criminal justice system is either neutral enough or generalized enough to be classed as a community or that an officer in that system is equipped to provide an unbiased and reliable evaluation of an inmate's general reputation for truth-telling. Nonetheless, the witness whose testimony was attacked was only material to the defense case insofar as he accused Long of

lying about Parker's *active* involvement in the Sheppard murder and his credibility was subject to impeachment on his record. In light of the totality of the evidence presented both by Long and by Parker himself, we find this error to be harmless.

In addition to considering all other issues raised on appeal, we have conducted an independent review of the record on trial and find no reason to award a new trial. Accordingly, the convictions are affirmed.

In sentencing Parker to death for the Sheppard murder in spite of the jury's recommendation of life, the trial judge found that Parker had been previously convicted of another violent felony, the murder was committed during a robbery, the murder was committed to avoid lawful arrest, the murder was committed for pecuniary gain, the murder was especially heinous, atrocious and cruel, the murder was cold, calculated and premeditated. We cannot accept the findings that the murder was committed during the robbery or that it was especially heinous, atrocious or cruel. Although Parker admitted taking the victim's necklace and ring from her body after her death, the evidence fails to show beyond a reasonable doubt that the murder was motivated by any desire for these objects. The motive expressed at the time of the killing was to keep the victim from implicating the murders in the death of Richard Padgett. Nancy Sheppard had offered the jewelry to Parker the evening before she was killed as payment for Padgett's debt. Parker refused it at that time and there is no indication that taking it after her death was more than an afterthought, rather than a motive for murder. This evidence does not satisfy the standard of proof beyond a reasonable doubt on which the finding of

an aggravating factor must be based. *Williams v. State*, 386 So.2d 538 (Fla.1980).

We note in passing that the finding that the murder was for pecuniary gain was not based on the taking of the jewelry. Rather, the trial court stated that the entire sequence of events in which the murders occurred was touched off by Parker's desire to establish a remunerative drug-dealing network and his need to establish a reputation as a collector of debts. The evidence amply supports this finding and we accept it.

We find the same lack of proof in the determination that the murder was especially heinous, atrocious and cruel. Evidence showed that Sheppard left her home willingly, expecting to meet her boyfriend, Padgett, in the woods. Her first indication that something was amiss came when she saw his body in the ditch. She fell to her knees, covered her face with her hands and cried out. Almost immediately she was shot and killed, execution style. There was nothing unusual in the manner or method of effecting the crime. We do not gainsay the pathos surrounding the murder of this young girl. However, this aggravating factor cannot properly be considered.

The trial court found no mitigating circumstances to balance against the aggravating factors, of which four were properly applied. In light of these findings the facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ. *Tedder v. State*, 322 So.2d 908 (Fla.1975). The jury override was proper and the facts of this case clearly place it within the class of homicides for which the death penalty

has been found appropriate. *Spaziano v. Florida*, ___ U.S. ___, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

Accordingly, the sentence of death is affirmed.

It is so ordered.

BOYD, C.J., and OVERTON, ALDERMAN, EHRLICH and SHAW, JJ:, concur.

ADKINS, J., concurs in the convictions, but concurs in the result only of the sentence.

McDONALD, J., concurs in the convictions, but dissents from the sentence.

IN THE SUPREME COURT OF FLORIDA

ROBERT LACY PARKER, Appellant, vs. STATE OF FLORIDA, Appellee.	CASE NO.: 63,700

MOTION FOR REHEARING

The Appellant, by and through his undersigned attorney, respectfully moves this Honorable Court for rehearing on the issues presented in this cause, pursuant to Fla. R. App. P. 9.330, and asserts the following grounds in support of his motion:

I

The affirmance of the defendant's death sentence in the Sheppard murder is a complete departure from previous decisions of this Court in jury over-ride cases. For this Court to apply the *Tedder* standard [*Tedder v. State*, 322 So.2d 908 (Fla. 1975)] to the instant case and to affirm the death sentence would be to adopt such a broad and vague construction of the *Tedder* standard as to violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. See *Godfrey v. Georgia*, 100 S. Ct. 1759 (1980).

Prior to the opinion written in this case, this Court described the standard of appellate review in jury over-ride cases as follows:

> We have repeatedly stated that in reviewing the propriety of a death sentence, this Court must weigh heavily the advisory opinion of life imprisonment by the sentencing jury. The facts justifying the death sentence must be clear and convincing in order to overrule the jury's recommendations. (Citations omitted) Therefore, we must examine this record to determine whether there are clear and convincing facts that warranted the imposition of the death penalty, and, on doing so, we must determine if there was a reasonable basis for the jury's recommendation. *Malloy v. State*, 382 So.2d 1190, 1193 (Fla. 1979).

In past decisions, this Court has analyzed the record to determine what factors could have influenced the jury to return a jury life recommendation. See *Welty v. State*, 402 So.2d 1159, 1164 (Fla. 1981); *Barfield v. State*, 402 So.2d 377, 382 (Fla. 1981). In the instant opinion, there is no mention whatsoever of the numerous statutory and non-statutory mitigating circumstances that were presented by the defendant at the trial level, yet virtually every mitigating circumstance presented by the defense has been previously recognized by this Court as a reasonable basis for a jury life recommendation.

In *Malloy*, supra, this Court reversed two death sentences for two execution-style murders, stating:

> We find that the jury's action was reasonable because of the conflict in the testimony as to who was actually the triggerman and because of the plea bargains between the accomplices and the State.
>
> From the evidence presented, the jury could have believed the appellant's story that he was not the triggerman and still have convicted him of first degree murder. *Id.* 1193.

Just as in *Malloy*, there was substantial conflict in the testimony as to the relative culpability of the four co-defendants involved in the Sheppard murder. The evidence moreover was undisputed that the defendant Robert Parker was *not* the triggerman. Just as in *Malloy*, the jury could have believed the defendant's testimony and still convicted him of first degree murder. In fact, the prosecution argued this theory to the jury. (T. 2147-2149, 2264). Just as in *Malloy*, the sentences of the co-defendants could have formed a reasonable basis for the jury life recommendation. In fact, the defense introduced evidence of the disposition of the co-defendant's cases and argued it as mitigation. (T. 2366, 2378, 2491-2496). Co-defendant Groover received a life sentence for first degree murder after trial, co-defendant Elaine Parker made a plea bargain to second degree murder; co-defendant Billy Long made a plea bargain to second degree murder. Where the triggerman and the one who lured the victim out of her home to be murdered were both given plea bargains to second degree murder, the jury life recommendation for the defendant can hardly be called unreasonable. *Slater v. State*, 316 So.2d 539 (Fla. 1975); *Taylor v. State*, 294 So. 2d 648 (Fla. 1974); *Hawkins v. State*, 436 So.2d 44 (Fla. 1983); *Barfield v. State*, 402 So.2d 377 (Fla. 1981).

In *Jacobs v. State*, 396 So.2d 713 (Fla. 1981), the fact that the defendant was the mother of two young children for whom she cared was found by this Court to form a reasonable basis for the jury's recommendation of life. Here, the defendant presented evidence that he was the father of two young children for whom he care (T. 2490-2491.

In *Goodwin v. State*, 405 So.2d 170 (Fla. 1981), this Court found that duress not amounting to a defense to the crime was a reasonable basis for a jury's life recommendation in a case involving three first degree murders. Duress was Robert Parker's defense to the Sheppard murder, but the trial court specifically instructed the jury that they could not consider it in the guilt phase. Duress, then, was a statutory mitigating circumstance that could very well have been found by the jury.

It was undisputed that Robert Parker was under the influence of alcohol and drugs at the time these murders were committed. This Court has repeatedly held that such intoxication is a reasonable basis for a life recommendation. *Kampff v. State*, 371 So.2d 1007 (Fla. 1979); *Buckrem v. State*, 355 So.2d 111 (Fla. 1978); *Norris v. State*, 429 So.2d 688 (Fla. 1983).

The defense presented the testimony of six witnesses regarding his troubled childhood; alcoholic, wife-beating father; the influence of Elaine Parker in involving the defendant with drugs; the defendant's relationship with his children; and actions of the defendant's reflecting concern and compassion for others. Such background and character evidence has been repeatedly held by this Court to be a reasonable basis for a life recommendation. *McCampbell v. State*, 421 So.2d 1072 (Fla. 1982); *Washington v. State*, 432 So.2d 44 (Fla. 1983); *Neary v. State*, 384 So.2d 881 (Fla. 1980).

The fact that the trial court judge found four valid aggravating circumstances and no mitigating circumstances hardly answers the question of whether there was a reasonable basis for the jury life recommendation, nor

does it compel the affirmance of a death sentence. In *Hawkins*, supra, the trial judge found five valid A.C.'s, and no mitigating circumstances but this Court reversed for a life sentence. In *Richardson* v. State, 437 So.2d 1087 (Fla. 1983), the trial judge found four valid aggravating circumstances and no mitigating circumstances; again this Court reversed for a life sentence.

In *Neary*, supra, the trial court found four valid aggravating circumstances and no mitigating circumstances, but this Court order a life sentence. In *Welty*, supra, the trial court found four valid aggravating circumstances and no mitigating circumstances, but this Court again remanded for imposition of a life sentence. In numerous other cases, the trial court judge found no mitigating circumstances and valid aggravating circumstances, but this Court ordered the imposition of a life sentence because a review of the record indicated a reasonable basis for the jury life recommendation: *Taylor* v. State, 294 So.2d 648 (Fla. 1974); *Barfield v. State*, 402 So.2d 377 (Fla. 1981); *Williams v. State*, 386 So.2d 538 (Fla. 1980); *Gilvin v. State*, 418 So. 2d 996 (Fla. 1982); *Provence v. State*, 337 So.2d 783 (Fla. 1976); *McCampbell v. State*, 421 So.2d 1072 (Fla. 1982); *Harvey v. State*, 439 So.2d 1372 (Fla. 1983).

In determining whether there is a reasonable basis for the jury life recommendation, this Court has, in its opinion in this cause, limited its scope of review to the sentencing order of the trial judge. This practice is clearly inconsistent with previous decisions of this Court, (See cases cited above.), and can only result in rubber-stamp approval of jury over-rides if it is to continue. The United

States Supreme Court has frequently cited the *Tedder* standard as an important check on arbitrary, capricious, unreliable, and disproportionate capital sentencing. To approve the death sentence in this cause pays but lip service to *Tedder*. This cause should be remanded for imposition of a life sentence.

II

The denial of defense requested jury instructions regarding legal defenses to all counts in the indictment, and the misleading and erroneous instructions of the lower court as to Count II of the indictment, had the practical effect of preventing the jury from considering Robert Parker's defense to any of the counts of the indictment, and of providing the jury with a theory of criminal liability as to Count II that was unsupported by the evidence, but argued by the prosecutor. These actions violated the defendant's right to a fair trial by an impartial jury, and procedural due process, as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 9, 16 and 22 of the Florida Constitution.

In the opinion rendered by this Court on September 6, 1984, the Court rejected the appellant's contention that an "independent act" jury instruction was required. In so doing, on page 3 of the opinion, the Court wrote: "Parker was on the scene and was still demanding repayment when Padgett was murdered." This statement is grossly inaccurate and without any support in the record whatsoever.

The undisputed evidence showed that Robert Parker and Elaine Parker were sitting in Elaine Parker's car when Tommy Groover shot and killed Richard Padgett outside the car. (T. 1844-1845). Furthermore, the issue of repayment had been resolved earlier in the day when Groover gave Robert Parker a gold cross and chain to hold as collateral. (T. 1826). Charlie Brown had said that he would "square up" with Groover on behalf of Padgett the next day, so Parker believed that the problem of money being owed had been resolved (T. 1838). Not only was there no evidence that Parker was demanding money from Padgett or Groover at the scene of Padgett's murder, there was not even any evidence that Groover was demanding money from him at that point.

The Court correctly states that the defendant would be entitled to an independent act instruction if any evidence which would support the theory of independent act was presented, and indicates that such evidence should be viewed in the light most favorable to Robert Parker. The Court apparently over-looked the evidence that was favorable to Robert Parker and which does support an independent act instruction:

(1) Parker was "not the least bit upset" with Padgett. (T. 1141).

(2) Padgett owed Parker nothing. (T. 1832-1833).

(3) Parker had no intention of killing Groover if Groover did not pay Parker. (T. 1822-3, 1827).

(4) There was no urgency for Parker to collect any money from Groover or Padgett because Parker had obtained Groover's gold jewelry to hold as collateral. (T. 1826).

(5) There was no reason for Groover to kill Padgett over a drug debt that night because Charlie Brown was going to pay it for Padgett the next day, and Groover knew it. (T. 1838).

(6) Parker had prevented Padgett from being seriously injured by Groover earlier that evening, and had taken Padgett to Carl Barton's house to clean his wounds. (T. 1470, 1840-1842).

(7) Parker was unaware of Groover threatening Padgett with a gun. (T. 1845, 1935).

(8) Parker thought Padgett was going to be dropped in the woods to walk home, not to be killed. (T. 1494, 1844).

(9) Padgett was not killed for a debt because he had $16.00 in his wallet that was left undisturbed. (T. 1117-1118).

(10) Parker and Padgett were good friends. (T. 1138, 1816).

(11) Groover and Padgett hated each other from previous encounters. (T. 1138, 1636, 1843).

It was the theory of the defense that Groover killed Padgett for personal reasons unrelated to any kidnapping.

The Court says "The murder was a natural and foreseeable culmination of the motivation for the original kidnapping." Such conclusory language undermines the very purpose of the independent act rule, which is that the issue of whether or not the murder was a "natural and foreseeable culmination" of the underlying felony is a question of fact for the jury to decide. *Bryant v. State*, 412 So.2d 347, 350 (Fla. 1982). Whether or not the homicide was "outside of and foreign to the common design," is a question for the trier of fact. *Bryant*, at 349.

The opinion by this court contradicts itself. In the second paragraph of page 2, the Court recognizes that the defendant Robert Parker presented evidence that he " . . . had no indication that Groover planned to kill Padgett or Dalton and that these murders were not part of any common scheme or in furtherance of any common goal." this is precisely the evidence that requires an independent act instruction.

The Court also failed to address the issues raised by appellant in Point II on Appeal in his brief, which involved the propriety of the lower court's refusal to instruct the jury on duress as a defense and instead instructed the jury that duress is not a defense to homicide, regardless of the circumstances. In its opinion, the Court states on page 4, that the defendant "defended his actions on a theory of independent act of a co-felon in the Padgett murder and a theory of duress in the Dalton and Sheppard killings." The ensuing discussion infers that the jury rejected a duress defense. Nothing could be further from the truth

The truth of the matter is that the jury was incorrectly instructed in two critical areas as to the Sheppard murder. The jury was told, first, that it could predicate the defendant's liability for the Sheppard murder on a felony-murder theory (R. 388, T. 2288-2290). Secondly, the jury was told, without qualification, that duress was not available as a defense to homicide. (R. 385, T. 2286). Both instructions were given over objection by the defense. (T. 2109-2112, 2265-2266). The State argued felony murder in summation (T. 2274-2275) and argued that, because duress was not a defense, the defendant was guilty even if his testimony was believed. (T. 2147-2149, 2153). The

guilty verdict of the jury can hardly be seen as a rejection of the defendant's testimony; in light of the jury recommendation of life, it is reasonable to conclude that the defendant's testimony was accepted, but that his defense was rejected because of the court's instructions. See Section 921.141(6)(e), *Fla. Stat.*

This Court, in page 6 of its own opinion, ruled that there was no felony involved in the Sheppard murder, and struck felony murder as an aggravating circumstance. The lower court was therefore incorrect in instructing the jury on felony murder. The State conceded in its brief that, under *Goodwin v. State*, 405 So.2d 170 (Fla. 1981), duress *is* a defense to felony-murder. (S.B.6). The jury was therefore instructed in a legally incorrect and factually misleading manner in two critical areas relating to the Sheppard murder. Not only was the jury told that a lawful defense supported by the evidence was not a defense at all, but they were permitted to convict the defendant on a theory of liability that was *not* supported by the evidence.

The erroneous and misleading instructions permitted the prosecutor to tell the jury that the defendant was guilty of felony-murder because he took Ms. Sheppard's necklace after she was killed, and that he was therefore guilty even by his own testimony. From the third degree murder verdict in the death of Judy Dalton, it was apparent that the jury applied the felony-murder rule broadly. Because the lower court's erroneous instructions permitted the jury to convict the defendant based on his own testimony, the prejudice is apparent and significant. The defendant should be given a new trial as to the Sheppard murder where the jury can be properly instructed.

As the United States Supreme Court has said,

> No principle of procedural due process is more clearly established than that notice of the specific charge, *and a chance to be heard in a trial of the issues raised by that charge* . . . are among the constitutional rights of every accused. (emphasis supplied) *Cole v. Arkansas*, 68 S. Ct. 514, 517 (1948).

Robert Parker has yet to be given a chance to be heard, and he has yet to have a jury consider his defenses. A new trial is in order.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

(Caption Omitted In Printing)

OPPOSITION TO MOTION FOR REHEARING OF THIS COURT'S OPINION.

COMES NOW, The State of Florida, by and through the undersigned counsel, pursuant to Rules 9.300 and 9.330, F.R. App.P., and opposes Appellant's Motion for Rehearing of this Court's opinion dated September 6, 1984. The following is submitted in support thereof:

I

Appellant's challenge to the Court's opinion under this point amounts to reargument over the propriety of a judicial override of a jury's sentencing recommendation of life imprisonment. In claiming a violation of the standard enunciated in *Tedder v. State*, 332 So.2d 908 (Fla. 1975), Appellant ignores this Court's opinion in *Ross v. State*, 386 So.2d 1191 (Fla 1980) cited in the State's brief at p.62. In *Ross*, this Court acknowledged that a jury recommendation under our trifurcated death penalty statute should be given great weight and serious consideration, but the trial judge is not required to impose the sentence recommended by the jury. Instead the "trial judge must still exercise its reasoned judgment in deciding whether the death penalty should be imposed." *Id* at 1197.

The position advocated by Appellant precludes the ability of the sentencing court to override a jury's recommendation of life imprisonment thereby undermining Florida's constitutionally approved trifurcated process in favor of "rubber stamping" a jury recommendation.

Counsel for Appellant obviously disagrees with the trial court's reasoning and with the analysis of this Court. However, such disapproval is not a proper ground for rehearing. A judicial override of a jury's sentencing recommendation of life imprisonment is constitutional. *Spaziano v. Florida*, ___ U.S. ___, 82 L.Ed.2d 340, 350-357 (1984)

In *Spaziano v. Florida*, the United States Supreme Court stated that the responsibility of the reviewing court is "not to second guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process in (sic) not arbitrary or discriminatory." *Id* at 82 L.Ed.2d 356. This Court has conducted meaningful and careful review of Appellant's sentence and has concluded the sentence of death was not arbitrarily or capriciously imposed. Contrary to the represention (sic) in motion, this Court has not limited its scope of review to the trial court's sentencing order.

II

Appellant's argument over the propriety of the defense requested jury instruction regarding an "independent act" overlooks Appellant Parker's involvement as a principal. The quarrel with this Court's reference to Parker's presence "on the scene" (motion at p.5-6) is nothing more than a sematical (sic) disagreement. The facts set forth in this Court's opinion are clearly supported by the record. Moreover, the factual circumstances of this case and *Bryant v. State*, 412 So.2d 347 (Fla.1982), are strikingly dissimilar as duly noted in brief and at oral argument before this Court.

Appellant's entire motion for rehearing is a condensed version of the points and argument advanced in brief and at oral argument. The motion urges this Court to reconsider matters previously considered and determined adversely to the position advocated by Appellant. As such, Appellant's motion is contrary to the governing rules of appellate procedure and established case law. Rule 9.330, F.R. App.P.; *Whipple v. State*, 431 So.2d 1011 (Fla. 2nd DCA 1983); *State of Florida ex rel Jaylex Realty Co. v. Green*, 105 So.2d 817 (Fla. 1st DCA 1985); *Williams v. State*, 113 So.2d 833 (Fla. 1959); *Sherwood v. State*, 111 So.2d 96 (Fla. 3rd DCA 1959). Inasmuch as the motion consists of reargument, it is improper and should be denied.

WHEREFORE, based on the foregoing argument and authority, Appellee, the State of Florida, respectfully urges this Court to deny Appellant's motion for rehearing.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA
MONDAY, DECEMBER 3, 1984

(Caption Omitted In Printing)

On consideration of the motion for rehearing filed by attorney for appellant, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, EHRLICH and SHAW, JJ., Concur

McDONALD, J., Dissents

IN THE SUPREME COURT OF FLORIDA

(Caption Omitted In Printing)

PER CURIAM.

The appellant, Robert Lacy Parker, was convicted of two counts of first-degree murder, and one count of third-degree murder, and was sentenced to death. We affirmed the convictions and sentences. *Parker v. State*, 458 So.2d 750 (Fla.1984), *cert. denied*, ___ U.S. ___, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985). Appellant's motion to vacate judgment and sentence and his application for a stay of execution before the trial court, pursuant to Florida Rule of Criminal Procedure 3.850, was denied by the trial court without an evidentiary hearing. Appellant seeks review of that denial. We have jurisdiction, article V, section 3(b)(1), Florida constitution, and we affirm.

Appellant raises three claims, two of which we find to be meritless, and only one which warrants discussion.

Appellant alleges a *Brady*[1] violation because the prosecutor at appellant's trial had made some cash payments, for lunch, travel expenses and loss of earnings, to several state witnesses. While we express no opinion on the propriety of these payments, *see Groover v. State*, 489 So.2d 15 (Fla.1986), we find appellant has shown nothing entitling him to relief.

Initially, we note that this issue has been addressed before. Counsel for appellant discovered, subsequent to appellant's trial and advisory sentencing proceeding, that three witnesses, Carl Barton, Spencer Hance and Joan

[1] *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

Bennett, had each received $20 from the prosecutor during the course of appellant's trial. Appellant brought this issue to the trial court's attention in his motion for new trial; this motion was denied. Appellant raised this issue before this Court on direct appeal; we found the issue to be insufficient to require reversal. 458 So.2d at 752. In the hearing below upon the instant motion, the trial court stated in its order denying appellant's motion for a subpoena duces tecum for records of these payments in the control of the state's attorney's office and motion for evidentiary hearing, that the evidence sought to be subpoenaed was cumulative to that presented in appellant's motion for a new trial, and raised on direct appeal before this Court. We agree.

Even if we assume that the nondisclosure of these small payments were a *Brady* violation, and that evidence of the extent and amount of these payments was not available to appellant until this year as counsel for appellant alleges, we find that appellant is not entitled to relief. In *United States v. Bagley*, ___ U.S. ___, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), the United States Supreme Court held that evidence is "material" for *Brady* purposes, "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 3384. Under this test, appellant's claim must fail. Appellant concedes that the testimony of Bennett and Long was crucial to the state's case. Our review of the trial record shows that appellant cross-examined Bennett about her interest in testifying, informing the jury that Bennett received a reduction in charges from first-degree murder to accessory after the fact in exchange for her testimony against appellant. Long was similarly cross-examined by appellant about his interest in testifying, informing the jury that Long,

who shot one of the victims, Nancy Shepard (sic), was allowed to plead guilty to second-degree murder and received a thirty-year prison sentence in exchange for his testimony against appellant. Applying the *Bagley* test, we must conclude that even if the jury had been informed about the one or two $20 dollar payments each of these witnesses allegedly received, the result of the trial would not have been different.

Appellant alleges this same *Brady* violation with numerous collateral witnesses and contends that these collateral witnesses contradicted appellant's testimony, thus undermining appellant's credibility with the jury. According to appellant's argument, had his counsel been aware of these payments, he would have been able to show these witnesses' interest in testifying. Even if true, we find the result to be totally speculative. The amount of money involved in these payments is small, and was characterized as simply lunch money, travel expenses and loss of earnings, and we cannot conclude that had the defense been aware of the payments, the result of appellant's trial would have been different.

Accordingly, the trial court's denial of relief is affirmed.

It is so ordered.

McDONALD, C.J. and ADKINS, BOYD, EHRLICH and SHAW, JJ., concur.

OVERTON, J., dissents with an opinion.

OVERTON, Justice, dissenting.

I find the allegations require an evidentiary hearing.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

ROBERT LACY PARKER,
Petitioner,

vs.

RICHARD DUGGER, Secretary, Florida Department of Corrections, and ROBERT A. BUTTERWORTH, Attorney General of the State of Florida,
Respondents.

Case No. 86-797-Civ-J-12

ORDER
DENYING RELIEF AS TO CONVICTIONS BUT REQUIRING RESENTENCING OF PETITIONER BY TRIAL JUDGE

This cause is before the Court on a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (1982), filed by ROBERT LACY PARKER, a death-row inmate at Florida State Prison. The petition seeks relief both with respect to the convictions against petitioner and with respect to the death sentence on one of the convictions. The Court will deny relief as to the convictions, but will grant relief as to the sentence of death.

I. BACKGROUND

(A) Procedural History

On February 25, 1982, petitioner was charged by indictment with the crimes of first-degree murder for the shooting deaths of Richard Padgett ("Padgett") and

Nancy Sheppard ("Sheppard"). By an amended indictment returned on May 20, 1982, petitioner was charged with a third count of first-degree murder for the death of Jody Dalton ("Dalton").

Petitioner's tr[illegible]egan on February 28, 1983, and on March 9, 1983, the jury returned a verdict of guilty as charged as to Counts I and II and guilty of third-degree murder as to Count III. On March 14, 1983, the trial court conducted an advisory sentencing proceeding and, at the conclusion of this proceeding, the jury recommended sentences of life imprisonment for both of petitioner's first-degree murder convictions. The trial judge overrode the jury's recommendation as to petitioner's conviction under Count II and imposed a sentence of death for the murder of Nancy Sheppard. Petitioner also received a sentence of life imprisonment under Count I and a fifteen-year term of imprisonment under Count III. These sentences were imposed on April 29, 1983.

The Supreme Court of Florida affirmed petitioner's death sentence on September 6, 1984, and denied his request for rehearing on December 3, 1984. *Parker v. State*, 458 So. 2d 750 (Fla. 1980) ("*Parker I*". The United States Supreme Court denied certiorari in *Parker v. Florida*, 470 U.S. 1088 (1985).

On May 19, 1986, petitioner filed a motion to vacate his convictions and death sentence, pursuant to Fla. R. Crim. P. 3.850. Approximately one month later, on June 20, 1986, the Governor of the State of Florida signed a death warrant and petitioner's execution was scheduled for 7:00 a.m. on July 15, 1986. Following the issuance of the death warrant, petitioner filed a motion for a stay of

execution, a motion for an evidentiary hearing and a supplement to the motion to vacate his convictions and death sentence. These motions were all denied by the trial court on July 1, 1986, and on July 8, 1986, the Florida Supreme Court affirmed. *Parker v. State*, 491 So. 2d 532 (Fla. 1986) ("*Parker II*").

Petitioner filed the petition in this Court on July 12, 1986, together with a motion for stay of execution and a motion for leave to proceed *in forma pauperis*. On July 14, 1986, the State filed a response to the petition and a Motion for Dismissal or Summary Disposition. The petition presents fifteen claims of alleged constitutional deprivation. The complex factual and legal questions raised in the petition prompted the Court to grant petitioner's motion for stay of execution of his sentence. The Court subsequently denied respondents' motion to vacate stay of execution, and held a nonevidentiary hearing on the petition on July 24, 1986. After due consideration of the petition and additional memoranda filed in support and opposition thereto, the Court found it necessary to hold an evidentiary hearing on the fourth ground in the petition, concerning payments to prosecution witnesses.[1] This hearing was held on February 18, 1987. Final written submissions concerning this issue were received from both parties in March 1987.

(B) Facts of the Crimes

Evidence introduced at trial revealed that petitioner sold various illegal drugs on a regular basis. As part of

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[1] *See infra* Part II, at pp. 14-30.

his operation, he would advance drugs to Tommy Groover ("Groover") and Billy Long ("Long") with the expectation they would eventually pay him for the drugs. It appeared that Groover in turn had "fronted" drugs to Padgett. On Saturday, February 6, 1982, petitioner, carrying a .22 revolver, set out to collect drug money owed to him by some of his friends. In so doing, he went to Groover's house and asked him to pay for drugs which had been advanced previously. Testimony showed that petitioner was very angry about the unpaid debt. In fact, when Groover was unable to make the payment, petitioner threatened to hang him. Shortly thereafter, Long and Groover, armed with a shotgun, visited other individuals to collect drug debts.

On this particular Saturday night, Groover and Long saw Padgett and Sheppard at a bar. When it appeared that Padgett was unable to pay a drug debt Groover persuaded Padgett and Sheppard to go with him and Long to petitioner's trailer. Thereafter, Long drove Sheppard to her house. Groover, petitioner, and petitioner's ex-wife went to petitioner's parents, junkyard.[2] At the

[2] The specific events leading up to the visit to the junkyard were in dispute at the trial. Joan Bennett testified that petitioner, his ex-wife, Groover, and Long were at a bar together early in the evening. She further testified that at the bar petitioner said he was tired of people owing him money for drugs. During his testimony, petitioner stated that he had not been at the bar but had been at Jerry Buruce's house for an oyster roast. In any event, petitioner, his ex-wife, Groover, and Padgett ended up at the junkyard. Long went his separate way and did not meet Groover and petitioner again until the following evening.

junkyard, Groover beat Padgett because Padgett was unable to satisfy the drug debt. A short time later, Padgett was taken by car to a wooded area. Petitioner's ex-wife drove the car; petitioner, Groover, and Padgett were passengers. Groover and Padgett got out of the car. Moments later, Groover fatally wounded Padgett with a single gunshot wound in the back of the head. Groover also inflicted Padgett with stab wounds which would have been fatal had Padgett not died immediately from the gunshot.

Sometime after midnight, while looking for Long, petitioner, petitioner's ex-wife, and Groover saw Dalton at a topless bar. Dalton left with the others to look for Long. Prior to driving to Long's house, they drove to the St. Johns River where Groover got out of the car and threw the pistol with which he had shot Padgett into the river. Then, they returned to petitioner's trailer.

Leaving Dalton at petitioner's trailer, the other three individuals drove to Joan Bennett's ("Bennett") trailer and took her with them back to petitioner's trailer. When they returned to the trailer, petitioner was outraged that Dalton had used some of his drugs. A short time later, Bennett, Groover, Dalton, petitioner, and petitioner's ex-wife went to Donut Lake to "drink beer and party." Once they arrived at Donut Lake, Groover, Dalton, and petitioner got out of the car. Groover then pulled a gun from his boot and shot Dalton several times in the head. A medical examiner later determined that Dalton had received four .22 caliber gunshot wounds to the head. Two of the wounds would have been fatal; each would have caused immediate unconsciousness. The medical

examiner could not determine which gunshot wound was inflicted first.

After Groover shot Dalton, Groover and petitioner took rope and concrete blocks from the trunk of the car, tied the blocks to Dalton's body, and took her body out into the lake. They all returned to petitioner's trailer, where they burned their clothes and shoes and Dalton's clothes. Then they went back to Donut Lake to look for petitioner's knife and wallet. After finding petitioner's wallet and after throwing water on blood in the dirt, they took Bennett back to her trailer.

Sometime in the early morning hours of Sunday, February 7, 1982, Groover, petitioner, and petitioner's ex-wife went to Long's house to ask Long for directions to Sheppard's house. Long was not there when the trio arrived, but he did return home between 6:30 a.m. and 6:45 a.m. According to Long, either petitioner or Groover told him that Padgett wanted to see his girlfriend, Nancy Sheppard. Long, got in the car with the others and told Groover how to get to Sheppard's house. They picked up Sheppard and drove to the wooded area where Padgett had been killed.

When they arrived at the wooded area, petitioner told the seventeen-year-old Sheppard that Padgett was wandering around "high" and wanted to see her. When they came to the ditch where Padgett's body was, petitioner and Long got out of the car, and walked over to the ditch. Petitioner showed Long the body and, in essence, told him that if he did not kill Sheppard he would end up like Padgett. Petitioner then returned to the car and asked Sheppard to get out. She walked over to the ditch, saw

Padgett's body, and fell to her knees. At that moment, Long, acting pursuant to petitioner's order, shot Sheppard in the back of the head twice with a .22 pistol. Long testified that Groover and petitioner told him to shoot her again; he fired the gun until it was out of bullets. Petitioner then cut Sheppard's throat and took her necklace and class ring.

The medical examiner determined that five .22 caliber gunshot wounds caused Sheppard's death. She had been stabbed seven times in the neck. The stab wounds were not fatal. The gunshot wounds caused immediate unconsciousness.

Petitioner, who testified on his own behalf at trial, has a somewhat different view of the facts. *See generally* Exhibit A to Petition for Habeas Corpus, Record and Transcript of Proceedings (hereinafter "R.") 1804-1991. Briefly stated, according to petitioner, he was an unwilling participant in the murders of Padgett, Dalton, and Sheppard. He claimed that the murders were orchestrated by Groover and that Groover threatened to harm petitioner's family if petitioner did not cooperate. Petitioner testified that he did not know that Groover planned to kill Padgett or Dalton. With regard to the murder of Sheppard, he stated that he had a notion that Groover and Long were planning to kill her, but he claimed he was not an active participant in the homicide. Petitioner further testified that the murders were not part of any common scheme or in furtherance of a common goal.

(C) Trial – Guilt Phase

The guilt phase of petitioner's trial commenced on February 28, 1983, with the selection of the jury. Jury

selection was completed on March 1, 1983, and counsel for the state and counsel for petitioner were afforded an opportunity to make an opening statement on March 2, 1983. In its case-in-chief, the state called twenty-one witnesses, including law enforcement personnel, medical examiners, individuals who discovered the bodies of the victims, and individuals who knew petitioner and had contact with him either shortly prior to, during, or shortly after the murders of Padgett, Dalton, and Sheppard.

The first part of the state's case was devoted to depicting the scenes of the crimes, explaining how the bodies of the victims were discovered and identified, and describing the various locations related to the events surrounding the murders. Next, the state offered testimony of how the events unfolded on Friday, February 5, 1982, Saturday, February 6, 1982, and Sunday, February 7, 1982. The state's key witnesses were Bennett and Long.

The defense called nine witnesses, including petitioner. The defense's theory of the case asserted that petitioner was coerced into participation in the killings and then framed by the true perpetrators so they could receive more favorable treatment. A key defense witness was Richard Ellwood ("Ellwood"), who testified that Long had claimed credit for the Sheppard murder and that Long had lied about petitioner's role.

Presentation of evidence was completed on March 8, 1983. Counsel for the state and counsel for petitioner delivered closing arguments on the following day, March 9, 1983. That same day, after deliberating approximately three hours and twenty-five minutes, the jury reached

verdicts as to the three counts with which petitioner was charged. The jury found petitioner guilty of first-degree murder in the deaths of Padgett and Sheppard and guilty of third-degree murder in the homicide of Dalton.

(D) Trial – Sentencing Phase

On March 14, 1983, the trial court reconvened the jury for an advisory sentencing proceeding. The state introduced evidence of a prior felony conviction by petitioner. In mitigation, petitioner presented testimony from his mother, grandmother, sister, cousin, a neighbor, and a jailhouse minister. Additionally, petitioner introduced evidence of the plea agreement for Elaine Parker and the advisory sentences and actual sentences for Groover. The state sought the death penalty for both the Padgett and Sheppard murders.

The state argued seven aggravating circumstances to the advisory jury: (1) previous conviction of another capital crime or of a violent felony; (2) knowingly creating a great risk of death to many persons in the commission of the crimes for which petitioner was to be sentenced; (3) the crimes were committed while engaged in the crimes of robbery (Sheppard) and/or kidnapping (Padgett); (4) the crimes were committed to avoid lawful arrest; (5) the crimes were committed for pecuniary gain; (6) the crimes were especially wicked, evil, atrocious or cruel; and (7) the crimes were committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. Petitioner pressed several statutory mitigating factors, but the heart of his sentencing-phase

defense was several nonstatutory mitigating circumstances which had previously been endorsed by the Florida Supreme Court. Petitioner sought jury instructions on the nonstatutory mitigating circumstances, but the judge denied the proposed instructions. Petitioner also sought a specific verdict form that would reflect which aggravating circumstances the jury found to be proved but the judge denied that request as well.

The advisory jury recommended life imprisonment for both murders, finding in each case that "sufficient aggravating circumstances do exist to justify the sentence of death, sufficient mitigating circumstances do exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death."

The judge took the advisory jury recommendations under consideration and held a hearing on April 29, 1983, to impose sentences. Petitioner presented no additional evidence at the hearing. The state brought in three witnesses, Padgett's mother and sister and Sheppard's mother, to testify regarding the murder victims and their families' recommendation for petitioner to receive the death penalty. Petitioner's counsel objected to the testimony but the objection was overruled. The prosecutor also read a written statement from the Sheppard family.

The sentencing order enumerates the presence or absence of statutory aggravating factors and statutory mitigating circumstances. The order is silent regarding nonstatutory mitigating circumstances. The judge found the presence of five aggravating factors in the Padgett

murder and six aggravating factors in the Sheppard murder.[3] He further found no mitigating circumstances to outweigh the aggravating circumstances in each murder. He then sentenced petitioner to death for the Sheppard murder and life imprisonment for the Padgett murder. With regard to the standard set forth in *Tedder v. State*, 332 So. 2d 908 (Fla. 1975), for determining the propriety of a judge override of a jury recommendation of life imprisonment, the order stated: "It is suggested that the facts and circumstances show that this test has been fully met."

(E) Issues Presented

Although petitioner raises fifteen grounds for relief, the Court will address only thirteen of the arguments. Since the Court grants relief as to the sentence of death, it is not necessary to rule on two other grounds challenging the sentence which are raised in the petition. *Messer v. Florida*, 834 F.2d 890, 895 n.1 (11th Cir. 1987).

Grounds Thirteen and Fifteen argue the correctness of the trial judge's decision to override the jury recommendation of a life sentence on Count II. These arguments should be presented to the judge at the new sentencing hearing, and if necessary to the state supreme court. Given the present disposition, this Court is not the forum in which to resolve the questions raised by those two grounds.

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[3] The Florida Supreme Court subsequently found that the evidence was insufficient to prove two of these aggravating factors. *See Parker I*, 458 So. 2d at 754.

Respondents have raised the issue of procedural bar for the review of some claims raised by petitioner. Petitioner did not present some of the grounds in this petition in the direct appeal of his conviction to the Florida Supreme Court. He did, however, list these grounds in a petition for rehearing of his direct appeal. Respondents opposed the grounds newly included in the rehearing petition solely on procedural grounds. Respondents accordingly argue that the Florida Supreme Court's rejection of the rehearing petition without opinion represents a ruling on the procedural issue and bars the argument of those grounds in a federal habeas corpus petition. Petitioner asserts that the denial of the rehearing petition represents a denial on the merits, or, alternatively, that the Florida Supreme Court's expansive scope of review on direct appeal constituted a waiver of the procedural rules which might bar consideration of the grounds in this Court.

The resolution of the procedural default question cannot be made readily by reference to precedent within this Circuit. One panel opinion faced this procedural question and concluded, "if the state supreme court on direct appeal overlooked [petitioner's] failure to raise [a] claim and *sua sponte* passed on its merits, federal habeas review would not be barred. . . . [B]y independently reviewing the record, the Florida Supreme Court waived [petitioner's] failure to raise [a] claim on direct appeal." *Mann v. Dugger*, 817 F.2d 1471, 1475, *reh'g in banc granted & opinion vacated*, 828 F.2d 1498 (11th Cir. 1987). This analysis fits tightly with the facts of the present petition. The Florida Supreme Court plainly stated the expansive scope of its review on direct appeal. *See Parker I*, 458 So.

2d at 754 ("In addition to considering all other issues raised on appeal, we have conducted an independent review of the record on trial and find no reason to award a new trial."). Petitioner's trial counsel clearly raised his objections on the two grounds which respondents claim are procedurally barred. The Florida Supreme Court could not have overlooked the presence of these issues. Following the panel's analysis in *Mann*, then, would lead this Court to find no default. Since the panel opinion was vacated, however, the Court must test the persuasiveness of the reasoning against other law in this Circuit.

A second panel opinion directly challenged the reasoning set forth by the *Mann* panel. *Lindsey v. Smith*, 820 F.2d 1137, 1143 (11th Cir. 1987). Although the differences between the two strains of thought could be reconciled by reference to the differences in state law scope of review between Florida (*Mann*) and Alabama (*Lindsey*), a recent *en banc* opinion strongly suggests that the majority of judges of the Eleventh Circuit Court of Appeals rejects the *Mann* panel's approach and would find procedural default when (as in the present case) petitioner asserts in a petition for rehearing to the state supreme court an argument not raised on direct appeal. *Hargrave v. Dugger*, 832 F.2d 1528, 1530 (11th Cir. 1987) (*en banc*) (dictum). The Court therefore concludes that petitioner is procedurally barred from pursuing Grounds One (felony murder instruction[4]) and Eleven (admission of false exculpatory statement upon arrest for different crime[5]) by way of federal habeas review, but the state of the law on the

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[4] *See infra* Part V(A), at pp. 41-47.

[5] *See infra* Part III(D), at pp. 35-37.

question of procedural default is sufficiently unsettled to warrant discussion of the merits of petitioner's claims, in an abundance of judicial caution.

II. PAYMENTS TO WITNESSES
Petitioner's Ground Four

(A) Background

Petitioner argues that the prosecution failed to disclose favorable evidence in the form of payments to witnesses, in violation of *Brady v. Maryland*, 373 U.S. 667 (1963), and further that the prosecutor actively misrepresented the existence of such evidence during trial, in violation of *Giglio v. United States*, 405 U.S. 150 (1972).[6] Respondents counter, in essence, that petitioner has failed to establish the occurrence of either a *Brady* or *Giglio* violation. Moreover, according to respondents, even if a violation did in fact take place, petitioner has not shown that there is any reasonable likelihood the information would have influenced the outcome of the case.[7]

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[6] The safeguards which emanate from *Brady* and *Giglio* have their roots in the due process clauses of the fifth and fourteenth amendments. Petitioner claims that as a result of the violations herein alleged, his fifth, sixth, and fourteenth amendment rights were impinged upon.

[7] In their Motion for Dismissal or Summary Disposition, respondents interpret petitioner's contention that the prosecution failed to reveal favorable evidence as a *Brady* violation claim and as a claim that the prosecution violated a state discovery rule (Fla. R. Cr. P. 3.220). The Court, however, reads petitioner's claim as one grounded in *Brady* and *Giglio*, not in a violation of a state discovery rule.

A chronological review of how this issue came to light, both factually and procedurally, and its treatment by the state courts and this Court is essential to its resolution. The following summary is undisputed.

Prior to trial, on March 3, 1982, defense counsel filed a Motion for Production of Favorable Evidence, pursuant to Fla. R. Cr. P. 3.220. Contained in paragraph C(4) of the motion was a request for the following: "Any scientific or medical report which tends to establish the accused's innocence, to mitigate punishment, or to impeach the credit or contradict the testimony of any witness whom the state will call at the trial of the cause." On August 18, 1982, defense counsel filed a motion to compel discovery, asking the prosecution to reveal the following:

> The existence and substance, and manner of execution or fulfillment of any promises, agreements, understandings, or arrangements, either verbal or written, between the State of Florida and any codefendants, prosecution witnesses, his attorney or representative, or other persons involved in this case wherein the State has agreed: to make any other recommendations of benefit or to give any other consideration to him or her.

R. 156-58. It is clear from the record that the fact certain payments had been made to prosecution witnesses was not disclosed by the prosecution in its responses to the aforementioned motions.

Sometime between the conclusion of the trial and sentencing, defense counsel learned that Chief Assistant State Attorney Ralph Greene ("Greene") had given three

state witnesses twenty (20) dollars each during the trial.[8] This issue was brought to the attention of the trial court in petitioner's Amendment to Motion for New Trial, filed on April 29, 1983. R. 464-466. During argument on the motion, the prosecutor acknowledged that these witnesses had been given twenty dollars each, not as payment for testifying but as expense money for food. R. 2529.[9] The trial court determined that the payments at issue had not resulted in any undue influence on any witness and denied the amended motion for new trial. R. 2530.

On April 28, 1986, further evidence that some witnesses had received money from the prosecution during the trial came to the attention of defense counsel. On that day, an assistant state attorney forwarded to defense counsel additional material relating to the case, including copies of reports of interviews of various witnesses which had been conducted by special agents of the Federal Bureau of Investigation. The information with regard to the interviews revealed that the prosecution may have given Bennett more than twenty dollars and additionally, that other state witnesses received money from the prosecution. R. 16-25.

The issue of the prosecution's failure to disclose payments to witnesses was among the twenty issues raised

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[8] The three witnesses who allegedly received payments were Carl Barton, Spencer Hance, and Joan Bennett.

[9] In response to a comment by defense counsel that twenty dollars was an extravagant amount for lunch, the prosecutor stated, "It wasn't one lunch, it was a lot of lunches and breakfasts and dinners during the course of that trial. . . . " R. at 2529.

regarding the guilt phase of the trial by petitioner on direct appeal. The Florida Supreme Court did not discuss this issue but stated that "all [twenty issues] have been considered in depth and found insufficient to require reversal." *Parker I*, 458 So. 2d at 752.

Petitioner again raised this issue before the trial court in his motion to vacate judgment and sentence and his application for stay of execution, filed pursuant to Fla. R. Crim. P. 3.850. Petitioner also sought a subpoena duces tecum for records related to any payments made to witnesses and asked for an evidentiary hearing on the matter. In denying petitioner's requested relief, the trial court determined that the evidence sought was cumulative to that which petitioner presented in his motion for new trial. Petitioner appealed the trial court's denial of his Rule 3.850 motion to the Florida Supreme Court.

The Florida Supreme Court found that even if the nondisclosure of the payments at issue resulted in a *Brady* violation, petitioner was not entitled to a new trial. Applying the "materiality" standard articulated by the United States Supreme Court in *United States v. Bagley*, 473 U.S. 667 (1985), the court concluded "that even if the jury had been informed about one or two $20 dollar payments each of these witnesses allegedly received, the result of the trial would not have been different." *Parker II*, 491 So. 2d at 533.[10] With regard to alleged payments to collateral witnesses, the court stated:

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[10] It is unclear precisely to whom the court was referring when it used the words "these witnesses". Early in its opinion,

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> The amount of money involved in these payments is small, and was characterized as simply lunch money, travel expenses and loss of earnings, and we cannot conclude that had the defense been aware of the payments, the result of appellant's trial would have been different.

Id.

This Court, after consideration of arguments advanced in support of and in opposition to the necessity of an evidentiary hearing on the issue of payments to prosecution witnesses, decided that petitioner had proffered sufficient evidence to warrant such a hearing. *See Townsend v. Sain*, 372 U.S. 293, 307 (1963); *Smith v. Wainwright*, 777 F.2d 609, 615 (11th Cir. 1985). The evidentiary hearing was held on February 18, 1987, and supplemental memoranda concerning the issue were received in March 1987.

(B) Findings of Fact[11]

The State Attorney's Office maintains an Information and Evidence Fund ("I & E Fund") for a myriad of

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the court refers to payments made to Carl Barton, Spencer Hance, and Joan Bennett. In the paragraph discussing the materiality of the payments, however, the court refers to Bennett and Long. This Court reads the words "these witnesses" as referring to Bennett and Long.

[11] Petitioner called the following witnesses at the February 18, 1987, evidentiary hearing: Mike Weinstein, Executive Director, State Attorney's Office; Jack D. Austin, Chief Investigator, State Attorney's Office; Spencer Hance, prosecution witness at petitioner's trial; and petitioner. Additionally, petitioner

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purposes, including but not limited to gaining information, protecting witnesses, paying expenses of witnesses, paying confidential informants, and making drug buys in undercover investigations. The money is kept in a revolving account. While a $5,000 balance is allowed, the average balance is $3,500. According to Mike Weinstein, who was the Executive Director of the State Attorney's Office and in charge of this fund during the time period relevant to this issue, $6,500 to $18,000 is spent through this fund in any given year.

To obtain money from the I & E Fund in 1982-83, any assistant state attorney or investigator could go to the State Attorney and seek approval for a certain amount of money. At that time, as Chief Assistant State Attorney, Greene also could disburse money from the fund. The request for funds form required a case number or investigation number, the check number, and the person's name making the request. There was no requirement that an explanation be given as to how the money would be spent. Individual employees were required to keep a record regarding the expenditure of these funds; however, receipts did not have to be included in this record

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moved the following exhibits into evidence: numerous Information and Evidence Fund ("I & E Fund") requests executed by Greene (Petitioner's Exhibit No. 1); Deposition of Greene, taken on January 22, 1987, and attachments thereto (Petitioner's Exhibit No. 2); and an inter-office memorandum directing the Clerk of County Court to enter a nol pros in a case in which Spencer Hance's girlfriend had been charged with driving without a valid driver's license (Petitioner's Exhibit No. 3).

keeping. For security reasons, funds could be withdrawn under one case control number but used in other, unrelated cases.

A review of the I & E Fund records, reveals that between May 3, 1982, and April 8, 1983, Greene requested and received $3,400 under two case control numbers given to this case.[12] His personal records indicate that he actually spent $1,470 for various witness-related expenses in this case. The remaining $1,930 was spent in conjunction with ten to fifteen other cases and investigations, a statewide grand jury matter, and a local grand jury matter.[13] The records reflect the following individuals were paid the following amounts:

Lewis Bradley	$230.00
Lewis Bradley and Denise Long	$ 80.00
Denise Long	$ 70.00
Mrs. Long	$ 20.00
John Bradley	$ 40.00
Ken Appleton	$ 70.00
Jimmy Thompson	$ 20.00
Morris Johnson	$180.00

[12] Greene explained that he used No. 11280 through most of 1982 and used No. 1658 late in 1982 and in 1983.

[13] When questioned further about the matter by petitioner's counsel, Greene stated that it was routine practice to use just one control number at a time, even though the money was expended in different cases. He further explained that he justified expenditures under control numbers in the Parker case as "money spent on homicide prosecution" regardless of the type of case or investigation on which monies were spent.

Wayne Johnson	$100.00
Freddie Brown	$ 40.00
Sherrie and Robert Collier	$110.00
Joan Bennett	$150.00
Mike Green	$100.00
Spencer Hance	$ 40.00
Joan Bennett, Spencer Hance and Carl Barton	$ 80.00
Ed Austin	$ 20.00
"other"	$120.00
TOTAL	$1,470.00

None of the witnesses who received money was required to sign a receipt or fill out an expense voucher or claim for reimbursement.[14]

According to Greene, prosecution witnesses were given various sums of money for one or more of the following reasons: lost wages; haircuts; clothes; child care; and transportation. Greene further testified that the sums of money paid to prosecution witnesses also encompassed payments made in connection with the trial of Groover.

The various cash payments made to Bennett were not related to or connected in any way with the plea bargain

[14] In addition to the above-mentioned payments, the testimony of Spencer Hance indicates that he asked for and received Greene's assistance regarding a traffic violation with which Hance's girlfriend had been charged. While Greene did not recall this specifically, he had a vague recollection of Mr. Hance seeking his assistance as to some matter.

she received for testifying as a prosecution witness against petitioner. Moreover, Greene stated that no one was paid for his or her testimony in this case, and no one was told to conceal the fact that he or she had been compensated for expenses.

(C) Analysis

Close scrutiny of the memoranda submitted by counsel for petitioner and counsel for respondents evinces very little disagreement over the factual underpinnings of this issue. The nub of the conflict is what legal significance should attach to these facts in the context of strategies employed by the respective parties in trying this case.

Petitioner's attack on the failure of the prosecution to disclose the fact that payments had been made to witnesses in excess of amounts authorized by statute is two pronged.[15] First, petitioner claims that at a minimum the prosecution's failure to disclose the payments amounted to a *Brady* violation, that is, the State suppressed favorable evidence that was material to petitioner's guilt, as well as to the punishment he received. Citing *Bagley*, petitioner asserts that the evidence of the payments is material because "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." 473 U.S. at 682.

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[15] *See* Fla. Stat. § 92.142(1) (stating that subpoenaed witnesses are to be paid five dollars per day and six cents per mile).

The second argument advanced by defendant is a hybrid *Giglio* claim. In *Giglio v. United States*, 405 U.S. 150 (1972), the star government witness stated on cross-examination that the government had not promised him that he would not be indicted if he would testify against defendant. During closing arguments, the prosecutor emphasized to the jury that this key government witness did not receive any promises in exchange for his testimony. Later, sometime after the trial, it was revealed that the witness had testified under a plea agreement he had with the government. Although the prosecutor who tried the case did not know of the agreement, the Court decided that the nondisclosure was his responsibility. The Court set aside Giglio's conviction, holding that "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury . . . .' " *Id.* at 154 (quoting *Napue v. Illinois*, 360 U.S. 264, 271 (1959)); *see Bagley*, 473 U.S. at 678-80 (reaffirming the *Giglio* standard). In the present case, petitioner claims that a series of events which took place during voir dire, as well as statements made by the prosecutor during closing arguments, combined to create circumstances analogous to a situation in which false testimony is presented to a jury.

During voir dire examination, in the presence of the entire venire, an exchange took place between defense counsel and a prospective juror about witnesses who testify as part of a "deal" and about accomplice testimony. Specifically, the juror stated:

> Let me understand what you are saying. First of all you are going to tell us that a person has been bribed to make a confession or to make a

> statement. All right. Then you are saying that this person is going to be brought before us to make a testimony [sic]. Right?

R. 729. When defense counsel agreed with the characterization of this testimony as "bribed", the prosecution objected and convinced the trial judge to instruct the venire that "no one has been paid for anything, we don't accept any bribe testimony in this court from anyone." R. 729. The prosecutor, in his closing argument, told the jury that state witness Bennett had received nothing for her testimony. R. 2254. In his summation, defense counsel referred to the incident during voir dire regarding the word "bribed" and told the jury that Long and Bennett may not have received money for their testimony, but they reaped a much greater benefit in the form of plea agreements. R. 2217-19. In light of the revelation that state witnesses were indeed given money, petitioner views the actions of the prosecution as a perpetration of a fraud upon the court and argues that this fraud is equivalent to the "known use of perjured testimony."

Petitioner believes that several factors, which he claims are unique to this case, lead to the unmistakable conclusion that the failure of the prosecution to disclose payments to witnesses meets the materiality standards for both a *Brady* violation and a *Giglio* violation. First, the theme of the defense throughout the trial was that key prosecution witnesses were lying or slanting their testimony against petitioner because of inducements from the state. Second, although the payments made to witnesses were relatively small, they become significant in view of the fact that the alleged motive for the murders was a

$50.00 to $100.00 drug debt and further that critical witnesses had very little money. Third, the trial judge told the jury that no witnesses had been paid anything for their testimony, when in fact, according to petitioner, they had been. Fourth, the prosecution told the jury that some of the witnesses had been given absolutely nothing, and that others were totally unbiased. It is petitioner's position that under the aforementioned circumstances of this case, the failure of the prosecution to disclose monetary payments, coupled with representations by both the trial judge and the prosecution that witnesses were not being paid, was so prejudicial to the defense that a new trial is required. This Court disagrees.

As previously noted, petitioner appears to claim that the nondisclosure of favorable evidence resulted in both a *Brady* violation and a *Giglio* violation. In some of his submissions on this issue, however, petitioner seems to suggest the prosecution's conduct triggers only a *Giglio* analysis. For the purpose of this opinion, the Court will treat the claims separately.

To establish a *Brady* violation, the petitioner must show the following: (1) that the prosecution failed to disclose evidence; (2) that the evidence was favorable to petitioner or exculpatory; and (3) that the evidence was material. *See Halliwell v. Strickland*, 747 F.2d 607, 609 (11th Cir. 1984), *cert. denied*, 472 U.S. 1011 (1985). This Court finds that the petitioner has met the first two prongs of this three-part test but has failed to meet the third prong.

The Supreme Court in *United States v. Bagley*, 473 U.S. 667, 682 (1985), formulated the appropriate test to

determine whether evidence is material under a *Brady* analysis:[16]

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the out come.

In the present case, the Court is not convinced the prosecution's failure to disclose the fact that payments were made to witnesses deprived the jury or the trial judge of information "sufficient to undermine the confidence in the outcome." *Id.* This determination is based upon several factors.

Contrary to petitioner's assertion that the motive for the murders in this cause was a $50.00 to $100.00 drug debt, the evidence suggested, and the prosecution argued, the unfortunate chain of events that culminated

[16] In its written submission titled Final Argument, respondents painstakingly work through the materiality standards set forth in *United States v. Agurs*, 427 U.S. 978 (1976). In short, respondents argue that petitioner failed to make a "specific demand" for disclosure of payments to witnesses; therefore the appropriate standard in this case is whether nondisclosed evidence creates a reasonable doubt about guilt that would not exist otherwise. In light of *Bagley*, however, this Court finds respondents' reliance on *Agurs* misplaced. Justice Blackmun, the author of the *Bagley* opinion, found the three separate tests for materiality in *Agurs* unnecessary. He stated that the standard formulated in a later case, *Strickland v. Washington*, 466 U.S. 668 (1984), is "sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused." *Bagley*, 473 U.S. at 682.

in the murders of three individuals was induced by petitioner's obsession with asserting control over those around him, particularly those individuals to whom he sold drugs. In this light, petitioner's argument that the amount of the payments for expenses to witnesses would have appeared significant and thus would have cast doubt on the veracity of their testimony, is unpersuasive.

Even more damaging to petitioner's argument that these payments were material, is the apparent treatment by the jury of defense counsel's attempt to impeach the two key prosecution witnesses, Long and Bennett, on cross-examination. Petitioner questioned Bennett about receiving a reduction in charges from first-degree murder to accessory after the fact in exchange for testifying against petitioner. Similarly, Long was cross-examined with regard to the plea agreement in which he was allowed to plead guilty to second-degree murder, instead of facing a charge of first-degree murder, in exchange for his testimony against petitioner. In addition to raising these points on the cross-examination of these witnesses, defense counsel argued these points vigorously during his closing argument. If the jury was not persuaded to disbelieve the testimony of these witnesses based upon the plea agreements explored on cross-examination and argued during closing arguments, the Court cannot say petitioner has met the "reasonable probability test" for materiality espoused in *Bagley* with regard to the undisclosed expense payments made to prosecution witnesses.[17]

[17] Likewise, there is a spillover effect as to the less critical state witnesses. The Court is not convinced that the jury would

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Finally, this Court's finding that there was no *Brady* violation is bolstered by its determination that the payments in question were not payments for testimony on a quid pro quo basis, but rather were payments for various expenses. That is, assuming arguendo, petitioner had been able to cross-examine witnesses about receiving payments, the prosecution could have swiftly rehabilitated these witnesses by simply inquiring as to the purpose of the payments, eliciting a response that the money was not accepted in exchange for testimony, but was reimbursement for expenses.[18]

Turning to petitioner's contention that the trial judge's instruction to the jury that "no one was paid anything in the case" created circumstances equivalent to the known use of perjured testimony, the Court finds the claim meritless.[19] The flaw in petitioner's argument is his

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have discredited the testimony of these witnesses because they received money for expenses when the jury would not discredit the testimony of Bennett and Long based upon the agreements they had with the state concerning the crimes for which they were charged. Bennett and Long were involved in most of the key events surrounding the murders. They placed petitioner at the scenes of the crimes and testified as to his role as a principal participant in the killings. Thus, even if the jury discredited the testimony of the other witnesses, the testimony of Bennett, Long, and petitioner himself could have resulted in the jury rendering the identical guilty verdicts.

[18] In his final memorandum on this issue, filed on March 4, 1987, petitioner recognizes that the payments made by the prosecution were not illegal.

[19] For the sequence of events upon which petitioner bases this claim, see *supra* at pp. 24-25.

basic premise that the statements he complains of were in fact false. A reading of the colloquy between the prospective juror and defense counsel concerning bribes and the ensuing exchange between the prosecutor and the trial judge is revealing. Clearly, the trial judge's instruction that "no one was paid anything in this case" was a statement to the effect that no one was paid money as a quid pro quo for testimony. Evidence gathered by this Court confirms this proposition. Likewise, when the statements made by the prosecutor during his closing argument are viewed in the context of the entire case, he was simply telling the jury that no one exchanged testimony for money. Again, the evidence before this Court confirms the prosecutor's statement. The fact is that all payments to witnesses in this cause were made either to reimburse the witnesses for expenses or to compensate them for lost wages. Thus, in view of the totality of the circumstances and upon consideration of the context in which the statements were made, this Court finds that neither the trial judge nor the prosecutor made false statements about payment to witnesses.

Even if the Court were to characterize the statements at issue as analogous to the known use of perjured testimony, the Court would have to determine whether the false statements created "any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Bagley*, 473 U.S. at 678; *see Giglio*, 405 U.S. at 150. "The thrust of *Giglio* and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony . . . ." *Smith v. Kemp*, 715 F.2d 1459, 1467 (11th Cir.), *cert. denied*, 464 U.S. 1003 (1983). As the court stated in *Brown v. Wainwright*, 785 F.2d 1457,

1465 (11th Cir. 1986), "[t]he constitutional concerns address the realities of what might induce a witness to testify falsely, and the jury is entitled to consider these realities in assessing credibility." This Court is of the opinion that the payments to the prosecution witnesses were so *de minimis* that they cannot be considered material. That is, there is no reasonable likelihood that disclosure to the jury that prosecution witnesses received money for lost wages and various expenses would have affected the jury's verdicts or the trial judge's sentences.

III. EVIDENTIARY QUESTIONS

Petitioner alleges five grounds upon which his convictions are tainted by erroneous evidentiary rulings of the trial court. The Court cannot grant relief for these alleged errors unless petitioner establishes that the rulings denied him "fundamental fairness" in the conduct of his trial. *Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir. 1984), *cert. denied*, 471 U.S. 1107 (1985). The level of error must be of a degree that it is "material in the sense of a crucial, critical, highly significant factor." *Shaw v. Boney*, 695 F.2d 528, 530 (11th Cir. 1983). The Court finds that the alleged errors neither individually nor cumulatively rise to this level.

(A) Collateral Criminal Acts – Petitioner's Ground Six

Petitioner enumerates twenty-six instances of evidence admitted into the trial that he alleges amounted to an attack on his character in an effort to create a motive for the killings. Petitioner lacks grounds to invoke this Court's review. The evidence assailed by petitioner's

argument is evidence which went to the issue of common scheme or motive, so its admission into the trial failed to render the trial fundamentally unfair. *Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir. 1984). Moreover, petitioner fails to fulfill his burden of demonstrating that the evidence was a critical or highly significant factor in the prosecution's case, taken in the context of all the other evidence admitted on the motive issue. *See id.*

(B) Limitation on Cross Examination of State Witness – Petitioner's Ground Eight

Petitioner alleges that the trial court violated his constitutional right to demonstrate bias or interest of a witness when he was prohibited from inquiring of Denise Long whether she was on probation at the time of the events to which she testified. The Supreme Court has stated succinctly the standard for review of this kind of alleged error:

> The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986). Upon review of these factors, the Court concludes that the error is in fact harmless beyond a reasonable doubt.

(C) Testimony Regarding Petitioner's Silence while in Jail – Petitioner's Ground Nine

Petitioner alleges that testimony elicited on cross-examination by the prosecutor from Ellwood, a defense witness, amounted to an improper comment on petitioner's post-arrest silence in violation of the rule developed in *Doyle v. Ohio*, 426 U.S. 610 (1976). Ellwood had testified on direct examination that Long, an important prosecution witness, had confessed in jail that he had lied about petitioner to get even for an earlier feud between petitioner and Long. The prosecutor inquired of Ellwood whether petitioner also had told his side of the story in jail. Although the exchange between prosecutor and witness appears to have gotten argumentative at one point, Ellwood consistently testified that petitioner did not discuss his case while in jail.

The Court perceives an important legal error in petitioner's argument. The *Doyle* rule rests on the *Miranda*[20] guarantee to post-arrest silence. The cases following *Doyle* focus on the period immediately following arrest and usually involve an arresting or attending police officer. When a criminal defendant invokes his right to counsel, the *Miranda-Doyle* analysis devolves into the sixth amendment *Massiah*[21] doctrine. The two guarantees are

[20] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[21] *Massiah v. United States*, 377 U.S. 201 (1964).

separate entitlements and based on different doctrinal foundations. Tomkovicz, *Standards for Invocations and Waiver of Counsel in Confession Contexts*, 71 Iowa L. Rev. 975, 993-94 (1986). The *Massiah* guarantee protects the criminal defendant from the use of information deliberately elicited by law enforcement officers or their agents. *United States v. Henry*, 447 U.S. 264, 270 (1980). Consequently, testimony from a jailhouse informant who passively listens to the confession of a criminal defendant does not violate the defendant's constitutional rights. *Kuhlmann v. Wilson*, 106 S. Ct. 2616, 2630 (1986).

Ellwood's testimony did not relate any statements deliberately elicited from petitioner.[22] His testimony related the truthful observation that petitioner did not discuss his case while in jail. Petitioner's right to counsel was not invaded.

If error is present on this claim, it was "invited error". *E.g.*, *Brown v. Dugger*, 831 F.2d 1547, 1559 (11th Cir. 1987) (Clark, J., concurring in part); *id.* at 1562-63 (Edmondson, J., dissenting); *United States v. Males*, 715 F.2d 568, 571 (11th Cir. 1983). Petitioner presented Ellwood's testimony to develop a theory that Long perpetrated the murders and then lied to place the blame on petitioner. The prosecutor was entitled to place the remarks in context. Whether petitioner also remarked on the events at trial had relevance to the context of Ellwood's testimony on Long's remarks. In fact, the context

[22] The Court notes that *Miranda* violations also are tested by a deliberate elicitation standard. *Arizona v. Mauro*, 107 S. Ct. 1931, 1935 (1987).

of the cross-examination question suggests that the prosecutor sought the information on conversations between Ellwood and petitioner in order to bolster further the prosecution's argument that Ellwood was lying. *See* R. 1788-91. The Court finds that petitioner has failed to demonstrate that the jury would naturally and necessarily take the questioning to be a comment on petitioner's silence. *United States v. Vera*, 701 F.2d 1349, 1362-63 (11th Cir. 1983). Moreover, petitioner's trial counsel revisited the topic on redirect examination of Ellwood. *See* R. 1792.

Even if the questioning is treated as a potential *Doyle* error, the Court notes that petitioner's post-arrest silence "was not submitted to the jury as evidence from which it was allowed to draw any permissible inference and thus no *Doyle* violation occurred in this case." *Greer v. Miller*, 107 S. Ct. 3102, 3108 (1987).

(D) Statement Made Upon Arrest for Separate Crime – Petitioner's Grounds Ten and Eleven

Petitioner argues that the admission into his trial of a statement made by petitioner upon arrest for a separate crime gives rise to two constitutional violations. One, petitioner asserts that his fifth amendment *Miranda* rights were compromised by the admission of the statement because he had not been informed of those rights prior to his uttering of the statement. Two, petitioner posits that his false exculpatory statement regarding one crime cannot be introduced on the issue of consciousness of guilt on a separate crime. Respondents argue that *Miranda*

rights were not violated because the statement was spontaneous and voluntary. Further, respondents assert that the alleged error does not rise to the level of habeas review and is procedurally barred.[23]

The facts surrounding the making of the statement are not in controversy. On February 11, 1982, Detective John Bradley of the Jacksonville Sheriff's Office arrested petitioner pursuant to an arrest warrant for an aggravated assault on someone other than the murder victims. At the time of the arrest police did not have probable cause to arrest petitioner for the murders. During the course of the arrest, Detective Bradley advised petitioner of the charge for which he was arrested and the facts underlying the charge, the pertinent fact being an allegation that he perpetrated the assault with a gun. Petitioner said to the detective that he didn't have a gun, didn't own a gun, didn't know anything about guns. Although petitioner was not prosecuted for the aggravated assault offense, his statements were introduced into the murder trial as false exculpatory statements and the jury was instructed that they could infer consciousness of guilt on petitioner's part because of the statement.

The alleged *Miranda* violation is without substance. Spontaneous, unsolicited statements by an arrestee are admissible without need for *Miranda* warnings. *United States v. Mulherin*, 710 F.2d 731, 739 (11th Cir. 1983). The reading of charges by an arresting officer cannot be construed to be an interrogation reasonably likely to elicit an incriminating response from an arrestee. *See United States*

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[23] The issue of procedural bar is resolved *supra* Part I(E).

v. Suggs, 755 F.2d 1538, 1541-42 (11th Cir. 1985) (showing copy of indictment to arrestee did not constitute interrogation); *United States v. Menichino*, 497 F.2d 935, 938, 940-41 (5th Cir. 1974) (orally informing arrestee of charges against him did not constitute interrogation).

The use of the statement in petitioner's murder trial constitutes an issue of state evidence law. Petitioner does not allege that the trial judge and reviewing court considered the question in a manner contrary to the state law on the subject. Therefore petitioner must demonstrate the significance of the admission of the evidence into the trial. At this task he fails. His argument for prejudice does not explain how, in the context of the overwhelming evidence of guilt, the admission of the statement could have affected the outcome of the trial. Additionally, petitioner's argument for prejudice assumes the irrelevance of the remarks to the murder trial, without disputing the evidentiary basis for its admission. *E.g., Douglas v. State*, 80 So. 2d 659, 661 (Fla. 1956).

(E) Cumulatively

The Court has considered the separate impact of each alleged violation of petitioner's rights. Additionally, the Court has assessed the cumulative impact of the allegations and finds that petitioner does not prove a cumulative impact sufficient to call into question the jury's verdicts.

IV. PROSECUTORIAL CONDUCT

Petitioner alleges two cases of prosecutorial misconduct, one involving cross-examination of petitioner and

the other involving comments made during the prosecutor's closing arguments. This Court's review on these matters is circumspect:

> The relevant question is whether the prosecutors' comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Moreover, the appropriate standard of review for such a claim on writ of habeas corpus is "the narrow one of due process, and not the broad exercise of supervisory power." *Id.* at 642.

Darden v. Wainwright, 106 S. Ct. 2464, 2472 (1986).

(A) Comment on Petitioner's Interaction with Counsel – Petitioner's Ground Seven

Petitioner took the witness stand and testified on his own behalf. During cross-examination by the prosecution, the trial broke for a supper recess. Petitioner's counsel sought and, after argument, received permission to consult with petitioner. When the trial resumed, the prosecutor vigorously questioned petitioner on the subject whether he was coached and the extent to which he consulted with his attorney. Petitioner's counsel interposed timely objection. Petitioner alleges violation of his right to counsel and violation of fundamental fairness.

No right to counsel was violated by the prosecutor's questioning. Although a defendant may not be restrained from consulting with his attorney during a court recess, *Geders v. United States*, 425 U.S. 80 (1976), a prosecutor is entitled to deal with the problem of possible improper

influence on testimony. *Id.* at 89. "A prosecutor may cross-examine a defendant as to the extent of any 'coaching, during a recess, subject, of course, to the control of the court." *Id.*

Petitioner does not provide an argument to surmount the heavy burden of demonstrating fundamental unfairness. From the narrow standard of review exercised by this Court, no unfairness is apparent. The prosecution sought to raise the inference that petitioner exploited the knowledge he gained from his attorney in order to fabricate his testimony. The theory of the case on both sides directly placed the credibility of every witness in controversy. It does not appear unfair to permit the prosecution to develop this inquiry in light of petitioner's opportunity to consult with counsel during the recess.

(B) Comments in Closing Argument of Guilt Phase – Petitioner's Ground Five

Petitioner lists several comments which he characterizes as improper, prejudicial, or inflammatory. The comments fall into three general categories: (1) remarks unfavorably describing petitioner; (2) remarks challenging the character of defense counsel; and (3) remarks of a testimonial nature. Petitioner argues that the remarks rendered his trial fundamentally unfair. Respondents of course disagree, and additionally assert that many of the remarks, and similar remarks, were not objected to by counsel at trial. The Court notes its earlier discussion of procedural default, *supra* Part I(E), and also notes that Florida would not enforce its contemporaneous objection rule if the contended error goes to a matter concerning

the fundamental fairness of the trial. *Brumbley v. State*, 453 So. 2d 381, 386 (Fla. 1984). The Court therefore perceives a convergence of relevant standards. If the error is cognizable for habeas relief, then the procedural rule also is overcome.

At the outset, the Court observes that the evidence of petitioner's guilt was great, and that the jury was instructed that arguments of counsel were not evidence, R. 2125. These two factors give confidence to the conclusion that the jury's decision rested on the evidence, not the arguments of counsel. *Darden*, 106 S. Ct. at 2472-73. The remarks describing petitioner were subject additionally to an instruction from the trial court, following defense counsel's objection, that the jury should disregard the prosecutor's characterization of petitioner, R. 2136. The remarks regarding defense counsel appear confined to comments invited by or responsive to the opening summation by counsel. *See Darden*, 106 S. Ct. at 2472. The trial court dealt adequately with the objections to the "testimonial" remarks. *See* R. 2150 ("guns everywhere" remark); R. 2252 ("6,000 felony cases a year" remark). In sum, the rhetoric from both sides was a lively exchange, often heated in the choice of words. The jury, properly instructed, can be expected to have understood the weight to accord the arguments. Petitioner's trial may not have been perfect, but due process does not depend upon perfection. Petitioner does not demonstrate the violation of due process necessary to invoke this Court's limited review of the alleged errors.

V. INSTRUCTIONS

Petitioner lists three errors in jury instructions at the guilt phase of his trial. Petitioner challenges the trial court's decision to give an instruction on felony murder, to deny his request for an instruction on a duress defense to the homicide charges, and to deny his request for an instruction on an independent act defense to Counts I and III.

(A) Felony Murder Instruction – Petitioner's Ground One

Petitioner argues that the jury instructions included both a charge concerning felony murder and a charge concerning premeditated murder, but the felony murder charge could not support a conviction on Count II for the same reasons which underlie the Florida Supreme Court's reversal of the robbery aggravating circumstance in sentencing. This evidentiary insufficiency, petitioner suggests, brings his conviction on Count II within the rule of *Stromberg v. California*, 283 U.S. 359 (1931). Accordingly, petitioner maintains his conviction must be vacated.

Petitioner's argument erroneously applies *Stromberg* to a general verdict for which the evidence is inadequate to support conviction on one of several independent grounds. The principles enunciated in *Stromberg* demand reversal of a conviction when (1) the jury is instructed that any one of the several listed grounds will warrant a guilty verdict; (2) determining on which ground the jury based its verdict is impossible; and (3) one of the listed grounds is constitutionally invalid. 283 U.S. at 368; *Adams v. Wainwright*, 764 F.2d 1356, 1361 (11th Cir. 1985). The

key for present purposes is the third element. As explained by the Supreme Court, when one listed ground is *constitutionally* infirm, the conviction must be overturned because upholding it "would be to countenance a procedure which would cause a serious impairment of constitutional rights." *Williams v. North Carolina*, 317 U.S. 287, 292 (1942). Because this kind of deprivation results, it has been held that *Stromberg* violations cannot be subjected to harmless error analysis. *See Adams*, 764 F.2d at 1362. This conclusion concerning harmless error analysis, however, is called into question by a recent Supreme Court decision. *See Rose v. Clark*, 106 S. Ct. 3101 (1986) (error in instructing jury to presume intent may be subject to harmless error analysis); *see also Chapman v. California*, 386 U.S. 18 (1967); *Quigley v. Vose*, 834 F.2d 14, 16 (1st Cir. 1987) (*Rose* trumps *Stromberg* on improper burden-shifting instructions).

The Court must distinguish, then, "between a conviction based on facts which, even if true, could not constitutionally form the basis for criminal sanctions, and a conviction based on facts which, if true, would indeed be grounds for criminal punishment but which [petitioner] claims were not proven at trial." *United States v. Dilworth*, 524 F.2d 470, 471 n.1 (5th Cir. 1975). In the former case, the Court usually cannot determine the charge upon which the jury rested its verdict. *But see Adams*, 764 F.2d at 1363. Thus, the third and second *Stromberg* elements are interdependent. The latter case, in contrast, involves an evidentiary inadequacy which the Court safely may presume the jury also recognized.

The second *Stromberg* element produces an analysis very similar to be harmless error analysis, as illustrated

in *Adams*.[24] The Eleventh Circuit panel concluded that it was "possible" (the second *Stromberg* element) to determine that the jury's verdict rested on premeditation because the felony murder theory had not been advanced at trial or argued by either counsel. *Id*. "Under these circumstances, it is not impossible to determine which ground the petitioner's conviction for first degree murder rests. The record reflects certainty that the conviction was for premeditated murder and not felony murder." *Id*.

An evidentiary inadequacy regarding one of the listed grounds may be analyzed in a like manner. The amended indictment alleged only the theory of premeditated murder. The instruction to the jury plainly directed them that the state had to prove the fact of robbery beyond a reasonable doubt and the instruction further defined the crime of robbery.[25] Moreover, contrary to

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[24] In *Adams*, the felony-murder instruction included reference to a felony statute that had been declared unconstitutional (the third *Stromberg* element) prior to the petitioner's trial. 764 F.2d at 1361.

[25] The instruction read (in relevant part):

> Now, felony murder in the first degree is defined in this way. Before you can find the defendant guilty of first degree felony murder, the State must prove the following three elements beyond a reasonable doubt: number one, that . . . Nancy Sheppard [is] dead; two, that the death occurred as a consequence of and while the defendant was engaged in the commission of . . . the crime of robbery of Nancy Sheppard; and . . . that Nancy Sheppard was killed by a person other than the defendant who was also involved in the commission or attempt to commit robbery of Nancy Sheppard, but that the defendant was present

(Continued on following page)

petitioner's argument, the prosecutor's closing argument emphasized the premeditation theory of Nancy Sheppard's death, almost to the exclusion of the felony-murder theory. Petitioner's trial counsel ably disputed the implied claim of robbery. R. 2205. The prosecutor then first explained the "robbery" in rebuttal. R. 2274-75. Thus, accepting the state supreme court finding that the evidence could not support a conviction for the felony of robbery, the Court finds the circumstances under which the jury considered the question make it possible to determine that the jury did not rest its verdict on the felony-murder theory. This finding ends the *Stromberg* challenge. *Zant v. Stephens*, 462 U.S. 862 (1983).

In the alternative, the Court finds the alleged error to be harmless. The instruction on felony-murder went to

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(Continued from previous page)

> and did knowingly aid, abet, counsel, hire or otherwise procure the commission of the robbery.
>
> * * *
>
> For the purposes of this case, robbery is defined as the taking of money or property from the person or custody of another by force, violence or assault, by putting the victim in fear. The property taken must be of some value and at the time of the taking the defendant must have intended to permanently deprive the victim of the money or property

R. 2288-90. This instruction may be distinguished from the harmless error criticized in petitioner's memorandum on the basis that this instruction defined the underlying elements of the felony murder, while the cases cited by petitioner did not. *See Teffeteller v. State*, 439 So. 2d 840, 844 (Fla. 1983); *Knight v. State*, 394 So. 2d 997, 1002 (Fla. 1981).

the issue of intent to commit the Sheppard murder.[26] The killing took place in an isolated place, execution-style. The sole issues present in the Sheppard killing were whether petitioner voluntarily participated in the killing, and if so, whether the killing was premeditated or in the course of a robbery. In fact, this second issue can be narrowed further because the state never presented a scenario other than a premeditated killing followed by robbery. The jury was left to decide the extent of petitioner's participation, and petitioner's counsel so confined the issue in his closing remarks. R. 2243-44. To find the predicate facts to participation in the robbery on this record, the jury would have to find precisely the same predicate facts that support the premeditation theory. "[I]t would defy common sense to conclude that an execution-style killing . . . was committed unintentionally." *Rose*, 106 S. Ct. at 3108 n.10.

Accordingly, the challenge to the felony-murder instruction could be resolved by asking the question whether the jury was mislead on the intent issue. This question may be solved by application of harmless-error analysis. *See id.* at 3107-09 (applying harmless-error analysis to instructions which direct jury to presume malice). Thus, the conviction should not be set aside if a review of the whole record confidently produces the conclusion that the error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. 673, 687 (1986). Framed

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[26] The instruction included this admonition: "[I]n order to convict of first degree felony murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill." R. 2289.

slightly differently, the inquiry focuses on "whether the evidence was so dispositive of intent that a reviewing court can say beyond a reasonable doubt that the jury would have found it unnecessary to rely on the presumption." *Connecticut v. Johnson*, 460 U.S. 73, 97 n.5 (1983) (Powell, J., dissenting); *accord Rose*, 106 S. Ct. at 3109.[27]

The Eleventh Circuit has implicitly endorsed this style of analysis for errors of the type alleged here. In *Drake v. Kemp*, 762 F.2d 1449 (11th Cir. 1985) (*en banc*), *cert. denied*, 106 S. Ct. 3333 (1986), the court of appeals used a harmless error analysis to decide the impact of an instruction shifting the burden of proof on the issue of intent. The trial judge in that case instructed on three theories of liability – malice murder, felony murder, and accomplice liability – and the jury returned a general verdict of guilty. The court of appeals granted habeas relief because the evidence and instruction could have permitted a jury finding that the petitioner merely assisted in the commission of an armed robbery which subsequently devolved into a murder committed by the prime mover in both crimes. *Id.* at 1456. This permissible conclusion led the court of appeals to examine the evidence on the intent issue and it found the evidence less than overwhelming. *Id.* at 1457. In contrast, the Eleventh Circuit has found harmless error in those instances for which overwhelming evidence of intent has been presented. *E.g., Potts v.*

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[27] The Court does not have to retrace the jury's deliberative process. Rather, the Court must determine that the facts found by the jury were such that it is clear beyond a reasonable doubt that if the jury had never heard the impermissible instruction its verdict would have been the same. *Pope v. Illinois*, 107 S. Ct. 1918, 1922 n.6 (1987).

Kemp, 814 F.2d 1512, 1516 (11th Cir. 1987); *Burger v. Kemp*, 785 F.2d 890, 892 (11th Cir. 1986), *aff'd*, 107 S. Ct. 3114, 3119 n.5 (1987); *Tucker v. Kemp*, 762 F.2d 1486, 1502 (11th Cir. 1985) (*en banc*), *cert. denied*, 106 S. Ct. 3340 (1986).

This Court's independent review of the record establishes, beyond a reasonable doubt, that the felony-murder instruction was harmless error. The jury had no need to rely on the presumption of intent that the felony-murder charge could have provided. This conclusion is consistent with the actions of the trial judge and the Florida Supreme Court, both of whom implicitly reached a similar conclusion by finding the "cold, calculated and premeditated" aggravating factor to be established beyond a reasonable doubt. *See Parker I*, 458 So. 2d at 754 (upholding factor and acknowledging standard for doing so). The Court also is entitled to presume on federal habeas review that those findings are correct. *Cabana v. Bullock*, 474 U.S. 376, 387-88 (1986).

(B) Duress Instruction – Petitioner's Ground Two

Petitioner alleges that he was entitled to an instruction regarding duress to support his defense that he participated in the homicides because he feared Groover and Long. Petitioner and respondents agree that the standard by which the refusal to grant the instruction is measured is whether the error so infected the entire trial that petitioner was deprived of his due process right to a fair trial. *Tyler v. Wyrick*, 635 F.2d 752, 753 (8th Cir. 1980).

Petitioner's argument encompasses a challenge to the correctness of the trial court's application of state law.

Petitioner claims that he was entitled to a duress instruction because duress is available as a defense for accomplices. However, petitioner does not raise a colorable claim that he should have been treated as a mere accomplice. To the contrary, the trial court (in its sentencing order) found petitioner to be an active, voluntary participant in the killings, a conclusion reiterated in the state supreme court opinion, *Parker I*, 458 So. 2d at 752-53. The factual findings concerning petitioner's culpability, made in the course of state court proceedings, are presumed correct on federal habeas review. 28 U.S.C. § 2254(d); *Cabana v. Bullock*, 474 U.S. 376, 387-88 (1986). Consequently, petitioner has no basis upon which to complain in this forum about the trial court's failure to grant the requested instruction.

(C) Independent Act Instruction – Petitioner's Ground Three

Petitioner argues that he was entitled to an instruction on Counts I and III that would recognize the independent act doctrine for felony murder. This doctrine elieves a co-felon of responsibility for a murder perpetrated by his accomplice if the acts leading to the murder are sufficiently independent of the co-felon's role in the underlying felony. Although the Florida Supreme Court thoroughly treated this issue, *Parker I*, 458 So. 2d at 752-53, petitioner alleges pervasive factual errors by the appellate court.

Petitioner's argument again goes to the issue of intent to commit murder. In this regard, both the trial court and the state supreme court made factual findings

that firmly establish petitioner's culpability. These findings are presumptively correct on federal habeas review. *Cabana*, 474 U.S. at 387-88. Petitioner's attempt to impeach these findings relies upon selective citation to testimony favorable to him. This approach does not surmount the burden which petitioner bears in challenging the trial court's refusal to grant his proposed instruction on an issue of state law. *Tyler*, 635 F.2d at 753.

VI. DISCRIMINATORY SYSTEM OF CAPITAL PUNISHMENT

Petitioner's Ground Twelve

Petitioner alleges that the death penalty is imposed unequally in Florida by reason of race. Petitioner presents a study by Professors Gross and Mauro that examines the relationship between the decision to sentence a defendant to death and the race of the homicide victim. Gross & Mauro, *Patterns of Death*, 37 Stan. L. Rev. 27 (1984). The study compares death sentences and victim race on a statewide basis in three states, including Florida. Petitioner must demonstrate, however, that the decision-maker in his case acted with discriminatory purpose, and that the purposeful discrimination had a discriminatory effect on him. *McCleskey v. Kemp*, 107 S. Ct. 1756, 1766 (1987). The statistical evidence presented here does not satisfy either part of this burden. *Darden v. Dugger*, 825 F.2d 287, 295 (11th Cir. 1987); *Elledge v. Dugger*, 823 F.2d 1439, 1450 (11th Cir. 1987).

VII. DEPRIVATION OF *TEDDER* PROTECTIONS REGARDING JURY OVERRIDE BY SENTENCING JUDGE

Petitioner's Ground Fourteen

Petitioner asserts that the trial judge's decision to impose a sentence of death over the jury's recommendation of life imprisonment violated the protections accorded to him by *Tedder v. State*, 322 So. 2d 908 (Fla. 1975) and its progeny. Petitioner further argues that appellate review failed to correct the trial judge's error and therefore a death sentence was imposed on him in violation of the guarantees secured by the eighth and fourteenth amendments. Respondents characterize petitioner's argument as a request for resentencing in federal court, an attempt to secure federal review of a state court's application of state law. The Court disagrees with respondents, view of this Court's role and finds merit in petitioner's argument.

Petitioner appeals to the *Tedder* standard for evaluating the propriety of a judge override of a jury's recommendation of a sentence of life imprisonment. According to *Tedder*, "to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." 322 So. 2d at 910. Moreover, "a jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." *Richardson v. State*, 437 So. 2d 1091, 1095 (Fla. 1983). This presumption of correctness attached to a jury's advisory verdict in favor of life has

been recognized as an important procedural right cognizable in federal habeas review.[28] *E.g., Magill v. Dugger*, 824 F.2d 879, 894 (11th Cir. 1987); *Adams v. Wainwright*, 764 F.2d 1356, 1364 (11th Cir. 1985). In *Spaziano v. Florida*, 468 U.S. 447 (1984), the Supreme Court "recognized the significant safeguard the *Tedder* standard affords a capital defendant in Florida. . . . Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory." *Id.* at 465;[29] *see Evitts v. Lucey*, 469 U.S. 387 (1985)

[28] Respondents seek to frame this issue as solely one of state law, not cognizable on federal habeas review. *See Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Wainwright v. Goode*, 464 U.S. 78, 83-84 (1983). The argument misunderstands the precedent upon which respondents rely. *See Saldana v. New York*, 665 F. Supp. 271, 276 n.8 (S.D. N.Y. 1987). Indeed, the *Pulley* Court conducted an inquiry into the nature of the state law protection claimed in that case, but found that California did not accord proportionality review to capital defendants. *See* 465 U.S. at 41-42 & n.5. Likewise, the *Goode* Court conducted an inquiry into whether the alleged violation of state law created an unreliable sentencing procedure. *See* 464 U.S. at 86-87. These inquiries are aspects of the ones undertaken in the present case.

[29] Respondents suggest that *Spaziano* has foreclosed review of this issue. They point to language stating, "there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence. . . . " 468 U.S. at 466. This citation, however, does not end this Court's inquiry. The Supreme Court indeed found no reason to doubt the conduct of appellate review by the Florida Supreme Court as of July 2, 1984. That conclusion does not imply that federal courts need never look at the issue again. In fact, *Spaziano* should be read as an instruction to the federal judiciary to determine whether the death penalty was properly imposed.

(state-created rights must be administered in accord with due process clause); *Hines v. Enomoto*, 658 F.2d 667, 672 (9th Cir. 1981) (due process right to procedure for empaneling impartial jury violated by denial to defendant of one half of peremptory challenges guaranteed by state statute).

Petitioner's counsel presented evidence at the sentencing hearing on many nonstatutory mitigating circumstances which the state supreme court previously found cognizable as matters which could reasonably support the jury's recommendation of life imprisonment. In particular, the following circumstances were developed in testimony and have previously (and subsequently as well) been given substantial weight by the Florida Supreme Court:

> (1) Petitioner suffered the effects of drug and alcohol intoxication at the time the murders were committed. *E.g., Masterson v. State*, 516 So. 2d 256, 258 (Fla. 1987); *Fead v. State*, 512 So. 2d 176, 178-79 (Fla. 1987); *Norris v. State*, 429 So. 2d 688, 690 (Fla. 1983); *Kampff v. State*, 371 So. 2d 1007, 1008 (Fla. 1979); *Buckrem v. State*, 355 So. 2d 111, 113 (Fla. 1978).
>
> (2) Petitioner's accomplices and codefendant received lesser sentences for their parts in the Sheppard murder. *E.g., Downs v. Dugger*, 514 So. 2d 1069, 1072 (Fla. 1987); *Brookings v. State*, 495 So. 2d 135, 142 (Fla. 1986); *Hawkins v. State*, 436 So. 2d 44, 47 (Fla. 1983); *Stokes v. State*, 403 So. 2d 377, 378 (Fla. 1981); *Malloy v. State*, 382 So. 2d 1190, 1193 (Fla. 1979).

This list is not exhaustive of petitioner's arguments, but it serves to illustrate the extent to which nonstatutory mitigating circumstances in petitioner's case could have exercised influence on the jury's recommendation of life imprisonment. The failure of the trial court to find the

presence of nonstatutory mitigating circumstances which are fairly supported by the record renders the death sentence unconstitutional and invalid. *Magwood v. Smith*, 791 F.2d 1438, 1449-50 (11th Cir. 1986). The record before the Court could fairly support a finding on these nonstatutory circumstances by a reasonable jury. *Cf. Jackson v. Virginia*, 443 U.S. 307, 324 (1979) (on habeas review, evidence is sufficient to support jury verdict unless no rational trier of fact could have found that proof as adduced in record supported verdict at appropriate standard of proof). The trial judge made no findings on the proffered nonstatutory mitigating circumstances, so the state supreme court's reliance on the trial judge's finding regarding mitigation cannot be said to include these factors.[30]

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[30] The opinion in *Parker I* does not indicate clearly whether the Florida Supreme Court independently scrutinized the record for the presence or absence of nonstatutory mitigating circumstances:

> The trial court found no mitigating circumstances to balance against the aggravating factors, of which four were properly applied. In light of these findings the facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ. The jury override was proper and the facts of this case clearly place it within the class of homicides for which the death penalty has been found appropriate.

458 So. 2d at 754 (citations omitted). *Compare Thompson v. State*, 456 So. 2d 444, 447 (Fla. 1984) ("From our review of the record we find that there were mitigating circumstances on which the jury could have properly relied and which could have reasonably persuaded the jury to advise life imprisonment.").

The trial judge's failure to address the nonstatutory mitigating circumstances also raises a *Hitchcock*[31] concern with this Court. The sentencing order enumerates the statutory mitigating circumstances, dismissing their application, but is silent on the issue of nonstatutory mitigating circumstances. *See Lewis v. State*, 398 So. 2d 432, 438-39 (Fla. 1981) (sentencing order in this form does not properly account for jury's right to evaluate nonstatutory mitigating circumstances). This silence must be contrasted to the judge's statement in open court that the sentencing order addresses all aggravating and mitigating circumstances. R. 2576. If the guarantee for consideration of (rather than mere presentation of) nonstatutory mitigating circumstances is to be given any meaning, then the trial judge must accord those circumstances weight as a reasonable basis for a jury's recommendation of life imprisonment. *Cf. Clark v. Dugger*, 834 F.2d 1561, 1569-70 (11th Cir. 1987) (holding *Hitchcock* error to be harmless error because *no* nonstatutory mitigating evidence was presented at sentencing hearing); *Magill v. Dugger*, 824 F.2d 879, 893 (11th Cir. 1987) (weight accorded jury's recommendation for life imprisonment dictates that resentencing after *Hitchcock* error involving advisory jury must include advisory jury).

Petitioner's argument is well taken despite the state supreme court's affirmance of *four* statutory aggravating factors. This ruling should be viewed in the light of the trial judge's imposition of a life sentence on petitioner for the Padgett murder (in accord with the jury's recommendation) although he found *five* aggravating factors and no

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[31] *Hitchcock v. Dugger*, 107 S. Ct. 1821 (1987).

mitigating circumstances.[32] The obvious distinction, a perceived difference in the victims, is not constitutionally permissible.[33] Moreover, the Florida Supreme Court has not hesitated to reverse a jury override sentence of death even when four aggravating factors are validated after appeal. *E.g., Masterson v. State*, 516 So. 2d 256, 258 (Fla. 1987); *Richardson v. State*, 437 So. 2d 1091, 1095 (Fla. 1983); *Welty v. State*, 402 So. 2d 1159, 1164 (Fla. 1981); *Neary v. State*, 384 So. 2d 881, 885 (Fla. 1980); *Brown v. State*, 367 So. 2d 616, 625 (Fla. 1979).

[32] The aggravating factors for the two murders substantially overlap. The sentencing order listed one aggravating factor for the Sheppard murder, that it was committed to avoid lawful arrest for the Padgett murder, which was not present in the Padgett murder. The Florida Supreme Court's reasons for invalidating two of the aggravating factors in the Sheppard murder do not apply to those same factors for the Padgett murder.

[33] The sentencing order repeatedly makes reference to Ms. Sheppard in particularly sympathetic terms, such as "the innocent and unsuspecting young Nancy" and "the helpless 17 year old girl." The trial judge, perhaps understandably, was drawing a distinction in what he perceived to the heinousness of the killings based on a difference between the victims. The Constitution, however, does not countenance distinctions of this nature. *Booth v. Maryland*, 107 S. Ct. 2529, 2534 n.8 (1987). The Court further notes that the proceeding before the judge included testimony not presented to the advisory jury on the subject of the victims, families views regarding the appropriate sentence. This testimony also offends federal constitutional guarantees. *See id.* at 2535-36; *Patterson v. State*, 513 So. 2d 1257, 1263 (Fla. 1987). Notably, petitioner's counsel interposed a timely objection to the relevance of receiving the victim impact testimony. R. 2534-35.

The trial judge must address several issues if the state chooses to seek a resentencing hearing for petitioner. Given the state of the record at this point, the judge must explain why the Sheppard murder, for which four aggravating factors have been allowed by the state supreme court, should be punished by death when the judge has already determined that the Padgett murder, for which five aggravating factors were found by the judge at petitioner's original sentencing, is punished by life imprisonment.[34] Moreover, the judge must determine whether petitioner has established (to the level of proof demanded by state law) the presence of nonstatutory mitigating factors and, if so, whether those factors provide a reasonable basis for the jury's recommendation of life.[35] Finally, the judge must decide if petitioner's offense, in the light of aggravating and mitigating circumstances, falls within the class of offenses deserving of a sentence of death. Succinctly stated, the judge must apply the *Tedder* standard with an eye to how that standard is applied statewide. This Court expresses no opinion on what outcome this process will produce; only the judge brings to the process the experience and judgment which is integral to Florida's capital sentencing scheme. The Constitution simply demands that this process be performed in a reliable and consistent manner.

The appropriate remedy is, of course, to set aside the death sentence. Since no problem is apparent in the

[34] The judge should be cognizant of the constitutional concerns raised *supra* note 33.

[35] The *Hitchcock* concerns raised *supra* also should be addressed.

procedure held before the advisory jury, the writ should be granted conditionally, with the state affording petitioner a resentencing hearing, *Magwood*, 791 F.2d at 1450, before a judge, based on the recommendation of the advisory jury from petitioner's original sentencing, *see Menendez v. State*, 368 So. 2d 1278, 1282 (Fla. 1979), and whatever additional relevant, constitutionally permissible evidence the judge may deem fit to receive. In the alternative, the judge may vacate the death sentence and impose a lesser sentence consistent with law.

Accordingly, it is ORDERED AND ADJUDGED:

1. That the Petition for Writ of Habeas Corpus is hereby denied as to the convictions;

2. That the Petition for Writ of Habeas Corpus is hereby granted as to the imposition of the death penalty sentence;

3. That petitioner shall remain in the custody of the Superintendent of the Florida State Prison, Starke, Florida; and

4. That the State of Florida shall have one hundred and twenty (120) days within which to afford petitioner a resentencing hearing before a sentencing judge or to vacate the death sentence and impose a lesser sentence consistent with law.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 26th day of February 1988.

/s/ Howell W. Melton
UNITED STATES DISTRICT JUDGE

United States Court of Appeals,
Eleventh Circuit.

**Robert Lacy PARKER,
Petitioner-Appellee,
Cross-Appellant,**

v.

Richard L. DUGGER, Secretary, Florida Department of Corrections, and Robert A. Butterworth, Attorney General, State of Florida, Respondents-Appellants, Cross-Appellees.

No. 88-3189.

June 19, 1989.

Before TJOFLAT, FAY and VANCE, Circuit Judges.

VANCE, Circuit Judge:

This is an appeal from the district court's judgment granting Robert Lacy Parker's petition for habeas corpus relief. We reverse.

I. FACTS

This case involves three murders committed in Duval County, Florida on February 6-7, 1982.[1] Parker, then a drug dealer, was known to have a violent temper and to possess several firearms. The day the murders began, Parker became irritated because many of his customers

[1] The facts were taken from the trial judge's written findings of fact as contained in his sentencing order. Parker does not allege the presence of any of the eight grounds for challenging these factual findings that are listed in 28 U.S.C. § 2254(d); therefore, the state trial judge's factual findings are presumed correct.

were not paying their accounts. He decided to reinforce his reputation as a tough dealer and began by throwing a rope over a tree limb and threatening to hang Tommy Groover, one of his distributors, if the debts were not paid. The next day Parker again threatened to kill Groover if he did not recover the money. Taking Parker at his word, Groover set out with Billy Long, another of Parker's acquaintances, to collect some of the debts. They first stopped at a local nightclub. There they found Richard Padgett, who was behind in his drug debts, with his girlfriend, Nancy Sheppard. The two men persuaded Padgett and Sheppard to accompany them to Parker's trailer, where Parker and his ex-wife, Elaine Parker, were waiting.

When the group arrived at the trailer, Parker took Padgett outside for a "discussion." A shot was fired. When the two came back inside, Parker had a pistol in his belt. Sheppard became alarmed and offered her necklace and ring to Parker as payment for Padgett's debt. Parker refused Sheppard's offer; instead, Long drove her home. The rest of the group accompanied Padgett as he tried to collect money to pay his debt. When he was unsuccessful, Padgett was taken to a junkyard owned by Parker's father. At the junkyard, Groover beat Padgett. Thereafter, the group drove to a secluded rural area. The three men exited the car and Padgett fell to his knees and begged for mercy. With Parker's aid, Groover shot Padgett to death and Parker and Groover threw his body in a ditch.

Parker, Groover, and Elaine cleaned up at the junkyard and drove to a bar where they met Jody Dalton, Groover's former girlfriend. Ms. Dalton decided to accompany them. The group first stopped to throw the

murder weapon into a river. Dalton witnessed this act. Next, they returned to Parker's trailer and dropped Dalton off while the rest of the group drove to the residence of Joan Bennett. When they returned with Ms. Bennett, Parker became angry because Dalton had used some of his drugs without his permission. Parker and Groover decided to "get rid" of Dalton and drove the entire group to an area known as Donut Lake. There Dalton was stripped, taunted, beaten, and kicked as she begged for mercy. Groover again with Parker's aid, shot Dalton to death. The two men tied up her body with rope and concrete blocks and threw it into the lake.

During the trip back, Parker and Groover discussed killing Bennett because she had witnessed the Dalton murder. Elaine convinced the two men that Bennett could be trusted and they drove Bennett home. The three concluded, however, that Sheppard could link them to Padgett's murder and decided to kill her. They first found Long, who directed them to Sheppard's home. Elaine then tricked Sheppard into accompanying the group by telling her that Padgett was "high" and wanted to see her.

The group soon arrived at the scene of the Padgett murder. Parker took Long to the ditch and asked him if he knew what was going on. When he replied that he did not. Parker told him that "either you kill Nancy or I will kill you."[2] Next, Parker took Sheppard to the ditch. Upon seeing Padgett's body, she fell to the ground and exclaimed "Oh, my God!" Elaine handed Long a pistol

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[2] Long had good reason to fear Parker; Parker had been imprisoned once for shooting Long.

and said, "You better do it or he'll kill you too." Long took the pistol and shot Sheppard in the head. Parker and Groover screamed, "Shoot her again, she's still breathing." Long shot her twice more. Parker than cut her throat with a knife and took her necklace and ring.

II. PROCEDURAL HISTORY

The State of Florida charged Parker by amended indictment with three counts of first degree murder. Count one charged Parker for the murder of Padgett, count two for the murder of Sheppard, and count three for the murder of Dalton. Parker and Groover were tried separately. Parker's trial began on February 28, 1983. Long and Bennett, among others, testified against Parker. Parker also testified, claiming that Groover orchestrated the murders and had threatened to harm Parker's family if he did not cooperate. The jury rejected this version of the facts and on March 9, 1983, found Parker guilty of first degree murder for the deaths of Padgett and Sheppard and third degree murder for the death of Dalton.

During the sentencing phase the state presented evidence of statutory aggravating circumstances, *see* Fla.Stat.Ann. § 921.141(5) (West 1985), and Parker presented evidence of both statutory mitigating circumstances, *see id.* § 921.141(6), and nonstatutory mitigating circumstances. The evidence presented by Parker included the testimony of six witnesses (his mother, grandmother, neighbor, cousin, sister, and minister), each testifying to some redeeming qualities in Parker's character.

The jury recommended that Parker receive life sentences for the murders of Padgett and Sheppard. The trial judge overrode the jury's recommendation as to count two, the murder of Sheppard, and sentenced Parker to death. The judge wrote detailed findings as to the statutory mitigating and aggravating circumstances present during the murder. He found no statutory mitigating circumstances[3] and six statutory aggravating circumstances.[4]

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[3] The trial judge expressly found that the following statutory mitigating circumstances, as specified in Fla.Stat.Ann § 921.141(6) (1985), were either not present or carried no weight:

> (a) The defendant has no significant history of prior criminal activity.
>
> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (c) The victim was a participant in the defendant's conduct or consented to the act.
>
> (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
>
> (e) The defendant acted under extreme duress or under the substantial domination of another person.
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> (g) The age of the defendant at the time of the crime.

[4] The trial judge found the following statutory aggravating circumstances to be presented:

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Parker appealed and the Florida Supreme Court affirmed. *Parker v. State*, 458 So.2d 750 (Fla.1984), *cert. denied*, 470 U.S. 1088, 105 S.Ct. 1855, 85 L.Ed.2d 152 (1985) [hereinafter *Parker I*]. The court held that the trial judge had erred in finding that two of the statutory aggravating circumstances were present.[5] The court nevertheless held that the remaining four statutory aggravating circumstances sufficiently outweighed the mitigating circumstances to justify the trial court's decision to override the jury's recommendation. The court specifically held that the trial judge's override complied with the standard

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(1) Parker was previously convicted of a felony involving the use of or threat of violence to the person.

(2) The capital felony was committed while Parker was engaged, or was an accomplice, in the commission of, or an attempt to commit, a robbery.

(3) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.

(4) The capital felony was committed for pecuniary gain.

(5) The capital felony was especially heinous, atrocious, or cruel.

(6) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

See id. § 921.141(5).

[5] The court held that the murder of Sheppard was not committed during a robbery, nor was it especially heinous, atrocious, or cruel, *Parker I*, 458 So.2d at 754.

announced in *Tedder v. State*, 322 So.2d 908 (Fla.1975), which mandates that a trial judge may override a jury's recommendation of life only when "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Id.* at 910, *cited in Parker I*, 458 So.2d at 754.

Parker thereafter moved under Fla.R.Crim.P. 3.850 to vacate the judgment and sentence. The trial judge denied the motion and the Florida Supreme Court affirmed. *Parker v. State*, 491 So.2d 532 (Fla.1986) [hereinafter *Parker II*]. Parker then filed a federal habeas petition. The court considered and rejected twelve grounds for relief,[6] but

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[6] The district court considered and rejected the following grounds asserted by Parker: (1) His conviction for murdering Sheppard was obtained by instructing the jury on a theory of liability, the felony-murder rule, that was unsupported by the evidence. (2) The trial judge improperly refused to grant Parker's requested jury instruction as to the Sheppard count that duress is a defense to felony-murder. (3) The trial judge improperly refused to grant Parker's requested jury instruction that he could not be found guilty of murdering Padgett and Dalton if the murders were the independent acts Groover. (4) The prosecution failed to reveal evidence favorable to the defense in the form of payments to state witnesses, despite repeated requests by the defense for this evidence, and actively denied its existence during trial. (5) The prosecution repeatedly made improper, prejudicial, and inflammatory remarks during the guilt phase summations. (6) The prosecution improperly introduced evidence of collateral acts and crimes of Parker solely to demonstrate Parker's propensity to commit crime. (7) The prosecution improperly cross-examined Parker about his conversations with is trial counsel. (8) The trial judge improperly prohibited Parker from showing the bias of a state witness by questioning her about her probationary status. (9)

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granted relief on one ground. Respondents appeal and Parker cross appeals.

III. RESPONDENTS' APPEAL

The district court granted relief on the following ground raised in Parker's habeas petition:

> The Florida Supreme Court has adopted such a broad and vague construction of the *Tedder* standard of review of jury overrides as to result in the arbitrary, capricious, and disproportionate application of the death penalty.

Respondents contend that the district court erred. We agree.

In *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the Supreme Court exhaustively examined the constitutionality of Florida's override scheme. The Court first examined the constitutionality of schemes in which a trial judge may impose the death penalty alone, without any input from a jury. *Id.* at 457-65, 104 S.Ct. at 3160-65. After concluding that such

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The prosecution intentionally elicited testimony from a defense witness that Parker had remained silent while in jail. (10) The state offered into evidence statements made by Parker after arrest and without benefit of *Miranda* warnings. (11) The trial judge improperly allowed into evidence statements made by Parker during an arrest for an unrelated crime and instructed the jury that the statements could be used as evidence of Parker's guilt in the present case. (12) The State of Florida imposed Parker's death sentence pursuant to a pattern of racial discrimination.

schemes are not *per se* unconstitutional, the Court likewise concluded the schemes in which the trial judge may impose the death penalty after receiving an advisory verdict of life from a jury are not *per se* unconstitutional. *Id.* at 465, 104 S.Ct. at 3165.

The Court then examined the particular override scheme used by the State of Florida and concluded that, in general, Florida's scheme is constitutional. The Court was persuaded by two aspects of the scheme that render it unlikely that the Florida courts will impose the death penalty in an arbitrary or discriminatory manner. First, several Florida procedural rules, of both statutory and case law origin, constrain trial judges from imposing the death penalty in an arbitrary or discriminatory manner. Among these significant safeguards is § 921.141(3) of the Florida Statutes, which requires trial judges to independently review the evidence and make detailed written findings regarding aggravating and mitigating circumstances before imposing the death penalty. *Spaziano*, 468 U.S. at 466, 104 S.Ct. at 3165. Another significant safeguard accorded capital defendants is the *Tedder* standard. *Id.* at 465, 104 S.Ct. at 3165. Second, the meaningful appellate review by the Florida Supreme Court in every capital case further reduces the likelihood that the death penalty will be imposed in an arbitrary or discriminatory manner. That court is required by law to review every death sentence to ensure that it has not been imposed arbitrarily or capriciously. *Id.* at 466, 104 S.Ct. at 3165 (citing Fla.Stat. § 921.141(4)). The Court noted that there has been no evidence that the Florida Supreme Court has failed to execute its responsibility faithfully, *id.* at 466, 104 S.Ct. at 3165, or hesitated to reverse a trial judge who has

derogated the jury's role by failing to comply with the mandates of *Tedder, id.* at 465, 104 S.Ct. at 3165. Thus, not only are Florida trial judges provided with procedural rules to aid them in performing their duty in a constitutional manner, the likelihood that they will succeed in ignoring these rules or incorrectly following them is reduced significantly by meaningful appellate review.

The Court's conclusion that Florida's override scheme is constitutional did not end its inquiry. Procedures that result in the constitutional application of the death penalty if followed correctly may result in the unconstitutional application of the death penalty if followed incorrectly. The Court therefore examined the record of the particular case before the Court and concluded that the application of Florida's scheme did not result in the arbitrary or discriminatory application of the death penalty. *See id.* at 466, 104 S.Ct. at 3165 ("We see nothing that suggests that the application of the jury-override procedure has resulted in the arbitrary or discriminatory application of the death penalty, either in general *or in this particular case.*") (emphasis added).

As in *Spaziano*, the present case involves the application of Florida's override scheme. Because the Court in *Spaziano* upheld the general constitutionality of the scheme, we need not re-examine this issue. Rather, we must examine the application of these procedures in this case. We conclude that the application of Florida's override scheme in the present case did not result in the arbitrary or discriminatory imposition of the death penalty.

The district court decision suggests that its grant of relief was influenced by dissatisfaction with the Florida Supreme Court's application of the *Tedder* standard to the facts in this case. *Spaziano* warns, however, that federal review for the arbitrary or discriminatory imposition of the death penalty must not devolve into second-guessing the Florida courts on question of state law, particularly on whether the trial judge complied with the mandates of *Tedder*:

> Our responsibility . . . is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory.

Spaziano, 468 U.S. at 465, 104 S.Ct. at 3165. The district court's opinion characterized the ground upon which it granted relief as alleging "that the trial judge's decision to impose a sentence of death over the jury's recommendation of life imprisonment violated the protections accorded to him by *Tedder v. State* and its progeny." The fact that the court interpreted this to be issue before it, and granted relief in response, suggests that the court granted habeas relief for the wrong reason.

We nevertheless must uphold the district court's decision if the record supports the conclusion that the death penalty was imposed in an arbitrary or discriminatory manner. Nothing in the record, however, supports such a conclusion. The district court noted that the trial judge did not make specific written findings with respect to the presence of nonstatutory mitigating circumstances and interpreted this silence as manifesting a conclusion that nonstatutory mitigating circumstances were not present. The court held that the presence of nonstatutory

mitigating circumstances was fairly supported by the record and therefore the failure to find the presence of such circumstances rendered Parker's death sentence invalid. *See Magwood v. Smith*, 791 F.2d 1438, 1449-50 (11th Cir. 1986) (cited in district court's opinion). Our court, however, has rejected the theory that a trial judge's failure to make specific written findings concerning nonstatutory mitigating circumstances raises the inference that he did not *consider* such evidence in reaching the decision to impose the death penalty. *See Johnson v. Wainwright*, 806 F.2d 1479, 1484 n. 8 (11th Cir.1986), *cert. denied*, ___ U.S. ___, 108 S.Ct. 205, 98 L.Ed.2d 157 (1987).[7] In

[7] The district court also expressed the concern that the trial judge's silence indicated that he did not consider nonstatutory mitigating circumstances before deciding to override the jury's recommendation of life and therefore he may have violated *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). We first note that Parker did not raise a *Hitchcock* allegation in his habeas petition. In any event, *Johnson v. Wainwright* answers these concerns. We also note that the trial judge prefaced his written findings with the following statement:

> [T]his Court has carefully studied and considered all the evidence and testimony at trial and at advisory sentence proceedings, the Presentence Investigation Report, the applicable Florida Statutes, *the case law, and all other factors touching upon this case.*

(emphasis added). The trial of this case occurred after *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (requiring consideration of nonstatutory mitigating circumstances), was decided and Fla.Stat. § 921.141 was amended to require Florida trial courts to consider nonstatutory mitigating circumstances. Given this and the fact that the trial judge listened to

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addition, no inference can be drawn from the trial judge's silence that he did not *find* nonstatutory mitigating circumstances to be present. Under the facts of this case the only reasonable conclusion is that the trial judge found at least some mitigating factors to be present, but also found that they were *outweighed* by the aggravating factors also present. In his sentencing order, the judge wrote that "[t]here are no mitigating circumstances that *outweigh* the aggravating circumstances in . . . the second count (Sheppard murder)." (emphasis added)

The district court also noted that the Florida Supreme Court has overturned jury overrides in other cases in which more statutory aggravating circumstances were present than in this case. Under Florida law, however, the sentencing process in capital cases is more than a simple calculation of the number of aggravating circumstances:

> [T]he procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So.2d 1, 10 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 195 (1974). The federal

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copious evidence of nonstatutory mitigating circumstances presented by Parker during the sentencing phase, we are convinced that the trial judge did in fact consider and weigh nonstatutory mitigating circumstances before deciding to sentence Parker to death.

constitution does not require that it should be. *See Barclay v. Florida*, 463 U.S. 939, 950, 103 S.Ct. 3418, 3425, 77 L.Ed.2d 1134 (1983) ("We have never suggested that the United States Constitution requires that the sentencing process should be transformed into a rigid and mechanical parsing of statutory aggravating factors."); *see also Spaziano*, 468 U.S. at 466, 104 S.Ct. at 3165 (jury override upheld even though only two aggravating factors present). The fact that there were "only" four statutory aggravating circumstances present during the Sheppard murder hardly compels the conclusion that the death penalty was imposed in an arbitrary or discriminatory manner.

Another concern of the district court was that the trial judge imposed a sentence of death for the murder of Sheppard but not for the murder of Padgett. The court concluded that the different sentences resulted from a perceived difference in the victims. The court reached this conclusion because the trial judge, in his sentencing order, referred to Sheppard in sympathetic terms as "the innocent and unsuspecting young Nancy" and "the helpless 17 year old girl." We think it is unreasonable to assign a discriminatory motive to a trial judge merely because he referred to the victim of a brutal murder in sympathetic terms. Trial judges cannot be expected to divorce from themselves all human emotion merely because a trial is at hand. As the Supreme Court stated in *Barclay*, "[i]t is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum, as if he had no experiences." *Barclay*, 463 U.S. at 950, 103 S.Ct. at 3425. The district court's

conclusion also ignores at least three aggravating circumstances present during the Sheppard murder that were not present during the Padgett murder: (1) the Sheppard murder was the third murder that day, while the Padgett murder was the first, (2) Parker cut Sheppard's throat to make sure the job was done, and (3) he murdered her to prevent her from identifying him as the murderer of Padgett. The evidence supports our conclusion that the trial judge gave Parker different sentences because the totality of the circumstances surrounding the two murders were different, rather than because of a perceived difference in the victims.

A state imposes punishment arbitrarily "when, without reason, if (sic) inflicts upon some people a severe punishment that it does not inflict upon others." *Furman v. Georgia*, 408 U.S. 238, 274, 92 S.Ct. 2726, 2744, 33 L.Ed.2d 346 (1972) (Brennan J., concurring). A state imposes punishment in a discriminatory manner when "it discriminates against [the defendant] by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." *Id.* at 242, 92 S.Ct. at 2728 (Douglas, J., concurring). We have reviewed the record and conclude that the imposition of the death penalty in this case falls into neither category.

IV. THE CROSS APPEAL

Parker contends that the district court erred in concluding that eleven of his grounds for habeas relief have no merit.[8]

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[8] Parker does not challenge the district court's holding that habeas ground twelve has no merit. *See supra* note 6.

A. Procedural Bar

One of these grounds is a claim under *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).[9] Respondents contend that this claim is procedurally barred from federal habeas review. We agree. A defendant who is procedurally barred in state court from raising a federal constitutional claim also is barred from raising the same claim in a federal habeas petition unless he can show cause for and actual prejudice from making the default. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The record reflects that Parker did not raise a *Stromberg* claim before the original trial court or on direct appeal to the Florida Supreme Court. He also did not raise the claim in his Rule 3.850 motion to the trial court or in his appeal to the Florida Supreme Court of the denial of the motion. Parker does not dispute that the failure to present the *Stromberg* claim to the Florida courts[10] constitutes procedural default under Florida law,

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[9] Habeas ground one. *See supra* note 6. Although Parker's habeas petition does not specifically cite *Stromberg* under habeas ground one. Parker argued this ground as a *Stromberg* violation in his brief to this court.

[10] Parker asserts that he raised a *Stromberg* claim in his petition for rehearing of his direct appeal to the Florida Supreme Court. We have examined Parker's petition for rehearing and conclude that he in fact did not present a *Stromberg* claim in his petition for rehearing.

Even if Parker had argued a *Stromberg* claim in the motion for rehearing of the direct appeal, we would conclude that the claim is procedurally barred from federal habeas review. After failing to raise the claim on direct appeal, Parker also failed to raise it in his subsequent Rule 3.850 motion. His failure to do

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nor does he attempt to show justifiable cause for making the default. He instead attempts to rely on an exception to the rule of procedural bar to the effect that the rule does not apply if the state courts have chosen not to enforce their own procedural default rule by deciding a claim on its merits. *See Dobbert v. Strickland*, 718 F.2d 1518, 1524 (11th Cir. 1983), *cert. denied*, 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 887 (1984).

Parker first points to language from the Florida Supreme Court's opinion disposing of his direct appeal, in which the court stated that "[i]n addition to considering all other issues raised on appeal, we have conducted an independent review of the record o[f] trial and find no reason to award a new trial." *Parker I*, 458 So.2d at 754. We do not agree that the supreme court thus indicated that it not only had chosen to decide the claims that were presented to the court on their merits, but also all conceivable claims that might have been presented to the court. Fla.R.App.P. 9.140(f) requires that "[i]n capital cases, the court shall review the evidence to determine if the interest of justice requires a new trial, whether or not

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so constitutes procedural default under Florida law. *See Delap v. State*, 513 So.2d 1050 (Fla.1987). When a claim is procedurally barred because the defendant failed to raise the claim to the last state court rendering a judgment in the case, the state court cannot be held to have waived the procedural default, even in the absence of a plain statement indicating that procedural default was not waived. *See Harris v. Reed*, ___ U.S. ___, ___-___, 109 S.Ct. 1038, 1046-48, 103 L.Ed.2d 308 (1989) (O'Connor, J., concurring). Thus, we conclude that the Florida Supreme Court, in disposing of the Rule 3.850 motion, did not waive procedural default as to the *Stromberg* claim.

insufficiency of the evidence is an issue presented for review." With the exception of challenges to the sufficiency of the evidence, we cannot accept the contention that the Florida Supreme Court would interpret Rule 9.140(f) as obviating, for capital defendants, the traditional requirement that appellants must present to the reviewing court all issues for which relief is sought.

Parker cites *Harris v. Reed*, ___ U.S. ___, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989), for the proposition that, despite his failure to present a *Stromberg* claim to the Florida courts, we must presume that those courts chose to ignore the procedural default because they have never "plainly stated" that Parker's *Stromberg* claim is procedurally barred. As applied in this case, however, *Harris* does not stand for such a proposition.

The defendant in *Harris* raised an ineffective assistance of counsel claim in a petition for postconviction relief before the state trial court. *Id.* at ___, 109 S.Ct. at 1040. The trial court denied the claim and the Appellate Court of Illinois affirmed in an unpublished decision in which it noted that the defendant had not raised an ineffective assistance claim in his previous direct appeal to the appellate court and that it was a "well-settled" principle of Illinois law that " 'those issues which could have been presented [on direct appeal], but were not, are considered waived.' " *Id.* The court nonetheless went on to consider and reject the defendant's ineffective-assistance claim on its merits. *Id.*

Although it was unclear in *Harris* whether the Appellate Court of Illinois rejected the petitioner's claim for procedural reasons or on its merits, there was no doubt

that the claim was presented to the court and therefore the court had the opportunity to reject the claim for procedural reasons. After analyzing the competing policy considerations at stake, the United States Supreme Court held that federal habeas courts must presume that, in the absence of a plain statement to the contrary, the state court elected to waive procedural default and decide, on its merits, any claim presented to the court:

> [A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case " 'clearly and expressly' " states that its judgment rests on a state procedural bar.

Id. at ___, 109 S.Ct. at 1043 (quoting *Caldwell v. Mississippi*, 472 U.S. 320, 327, 105 S.Ct. 2633, 2638, 86 L.Ed.2d 231 (1985)).

When a claim was never *presented* to the state courts, however, as in the present case, the policy considerations discussed in *Harris* render it unreasonably to presume that the state courts waived procedural default. Justice O'Connor, in her concurring opinion in *Harris*, analyzed this situation in detail and reached the same conclusion:

> [It] would make no sense . . . [to] require a "plain statement" indicating state reliance on a procedural bar where no state court was ever given the opportunity to pass on either the procedural posture or the merits of the constitutional claim.

Id. at ___, 109 S.Ct. at 1047 (O'Connor, J. concurring). We find Justice O'Connor's rationale persuasive and

therefore conclude that Parker's *Stromberg* claim is procedurally barred from federal habeas review.[11]

B. Requested Instructions

Parker contends that he is entitled to habeas relief because his requests for certain jury instructions were denied.[12] He first asserts that he was entitled to the following instruction, which proposed the duress defense to the Sheppard murder:

> One of the defenses asserted in this case is that the defendant participated in the alleged offense under duress; that is, that he was forced to participate in the offense alleged. In order to constitute a defense, the co-ercion or duress must be present, imminent, and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily injury if the act is not done.
>
> It is assumed that every person's actions are free from duress, absent evidence to the contrary. However, once some evidence of duress has been brought before the jury, the burden is upon the State to prove beyond a reasonable doubt that the defendant did not act under duress.

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[11] We also conclude that dismissing Parker's petition for failure to exhaust administrative remedies is not appropriate. *See Harris*, ___ U.S. at ___, 109 S.Ct. at 1047 (O'Connor, J. concurring) ("[D]ismissing . . . petition for failure to exhaust state court remedies would often result in a game of judicial ping-pong between the state and federal courts, as the state prisoner returned to state court only to have the state procedural bar invoked against him") (citation omitted).

[12] Habeas grounds two and three. *See supra* note 6.

Parker argues that the trial judge erred as a matter of Florida law in denying this instruction and cites several federal cases holding that a state trial judge can violate a defendant's right to due process by committing an error of state law in denying a requested jury instruction. *See, e.g., United States ex rel. Reed v. Lane*, 759 F.2d 618 (7th Cir.1985), *cert. denied*, 475 U.S. 1048, 106 S.Ct. 1268, 89 L.Ed.2d 577 (1986).

Parker asserts that the state relied on the felony murder doctrine to obtain his conviction for murdering Sheppard. He also argues that under Florida law duress is a defense to felony murder and therefore he was entitled to have the instruction delivered. We need not decide whether these assertions are correct because the state also relied on an intentional murder theory to obtain Parker's conviction. Under Florida law, duress is not a defense to intentional murder. *Wright v. State*, 402 So.2d 493, 498 (Fla.Dist.Ct.App.1981); *Cawthon v. State*, 382 So.2d 796 797 (Fla.Dist.Ct.App.), *petition for rev. denied*, 388 So.2d 1110 (Fla.1980). The requested instruction therefore is misleading because it implies that duress is a defense to either felony murder *or* intentional murder. A Florida trial judge does not err by refusing to give an erroneous instruction. *Barwicks v. State*, 82 So.2d 356, 358 (Fla.1955); *Halfrich v. State*, 165 So. 285, 288-89 (Fla. 1936). Consequently, we concluded that the trial judge properly denied the requested instruction under Florida law and correspondingly did not violate Parker's right to due process.

Parker also contends that he was entitled a jury instruction that he could not be found guilty of murdering Padgett if the killing was the independent act of Groover. The Florida Supreme Court, on direct appeal,

rejected this contention because it did not find any evidence on the record that would support the instruction. *See Parker I*, 458 So.2d at 752. The district court, citing *Cabana v. Bullock*, 474 U.S. 376, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986), held that this conclusion is presumed to be correct.

The district court misinterpreted *Cabana*. That case held that a federal court reviewing a case for a violation of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (death penalty may not be imposed on one who has neither killed, attempted to kill, or intended that a killing take place or lethal force be employed), must not focus exclusively on the instructions given to the jury. *Cabana*, 474 U.S. at 387, 106 S.Ct. at 697. Rather, the court must examine the entire course of the state proceedings to determine whether the requisite factual finding as to the defendant's culpability has been made. *Id*. If it has, the finding must be presumed correct by virtue of 28 U.S.C. § 2254(d) unless the habeas petitioner can bear the heavy burden of overcoming the presumption. *Id*. at 387-88, 106 S.Ct. at 697-98.

Under *Cabana*, therefore, findings by state judges sometimes may cure deficient jury instructions concerning the sentence a defendant is to receive. As the Court carefully noted, however, findings by state judges cannot cure deficient jury instruction concerning the elements of the crime itself:

> Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime.

Id. at 384-85, 106 S.Ct. at 696. Consequently, the direct court erred in presuming the correctness of the Florida Supreme Court's finding that the evidence was insufficient to support an independent act instruction. We nevertheless have independently reviewed the record and have determined that the evidence was insufficient to support an independent act instruction. The district court therefore did not err in refusing habeas relief on this ground.

C. Remaining Issues

The remaining issues Parker raises on appeal warrant little discussion. Three of these issues relate to conduct by the prosecution.[13] First, Parker alleges that the prosecution violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose evidence favorable to the defense. The district court, applying the three-part test of *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985), found that there was not a reasonable probability that, had the evidence been disclosed to the defense, the result of the trial would have been different. We have examined the record and conclude that this finding is not erroneous. Second, Parker alleges that the prosecution violated Parker's constitutional right to counsel by asking him during cross-examination whether he had been coached by his counsel during a recess. Subject to the control of the trial judge, however, the prosecution may cross-examine a defendant as to the extent of any coaching that may have occurred during a recess. *Geders v. United States*, 425 U.S. 80, 89, 96

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[13] Habeas grounds four, five, and seven. *See supra* note 6.

S.Ct. 1330, 1336, 47 L.Ed.2d 592 (1976). Third, Parker alleges that several remarks made by the prosecution were improper, prejudicial, and inflammatory. We agree with the district court that the comments were invited by defense counsel's own heated comments during opening summation. The district court summed it up correctly:

> [T]he rhetoric from both sides was a lively exchange, often heated in the choice of words. The jury, properly instructed, can be expected to have understood the weight to accord the arguments. Petitioner's trial may not have been perfect, but due process does not depend upon perfection.

The evidence of guilt was overwhelming in this case and the trial judge cautioned the jury not to use the arguments of counsel as evidence. We are convinced that the prosecution's comments did not " 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.' " *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2472, 91 L.Ed.2d 144 (1986) (citation omitted).

Parker's final contentions concern several evidentiary rulings by the trial judge[14] Parker is not entitled to habeas relief unless the rulings denied him a fundamentally fair trial. *Hall v. Wainwright*, 733 F.2d 766, 770 (11th Cir1984), *cert. denied* 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). We have reviewed the record and

[14] Habeas grounds six, eight, nine, ten, and eleven. *See supra* note 6.

agree with the district court that the alleged errors neither individually nor cumulatively rendered Parker's trial fundamentally unfair.

V. CONCLUSION

Our review of the record reveals that Parker was not deprived on his constitutional right to a fair trial. The district court's judgment granting Parker habeas corpus relief therefore is

REVERSED.

SUPREME COURT OF THE UNITED STATES

No. 89-5961

Robert Lacy Parker,

Petitioner

v.

Richard L. Dugger, Secretary, Florida Department of Corrections, et al.

ON PETITION FOR WRIT OF CERTIORARI TO THE United States Court of Appeals for the Eleventh Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

June 28, 1990
